FILED
AUG 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC., *Appellants*

v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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No.

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v.

MARYLAND STATE BOARD OF CENSORS, *Appellee*

On Appeal From the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeals of Maryland, entered on October 22, 1969 (App. B., p. 37a *infra*), affirming the order of the Circuit Court of Baltimore City (App. C, pp. 38a-46a *infra*) disapproving the film "I Am Curious (Yellow)" for licensing under the Maryland Motion Picture Censorship Law, Art. 66A, Md. Code Ann. (1964 ed. and 1969 Supp.).

OPINIONS BELOW

The three opinions filed in the court below (a majority opinion for four judges, a supplementary concurrence by Judge Barnes, and the dissenting opinion of Judge McWilliams, joined by Chief Judge Hammond and Judge Singley) are not yet reported. They are reprinted as Appendix A, pp. 1a-36a *infra*. The opinions of the United States Court of Appeals for the Second Circuit in *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (1968), are reprinted in Appendix D, pp. 47a-62a *infra*.

JURISDICTION

This action was instituted by the Maryland State Board of Censors in the Circuit Court of Baltimore City pursuant to Md. Code Ann., Art. 66A, § 19, for a judicial determination as to the obscenity of the film "I Am Curious (Yellow)." The judgment of the Court of Appeals of Maryland, affirming the judgment of the Circuit Court, was entered on October 22, 1969, and a notice of appeal was filed on November 4, 1969. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2). See, *e.g.*, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *A Book Named "John Cleland's Memoirs of A Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966); *Mishkin* v. *New York*, 383 U.S. 502 (1966).

STATUTE INVOLVED

The Maryland motion picture censorship statute, Md. Code Ann. Art. 66A, is set out in Appendix J, pp. 91a-102a *infra*.

QUESTIONS PRESENTED

1. Whether Maryland's motion picture censorship statute (Md. Code Ann., Art. 66A) has been applied in this case to prevent the exhibition of a film ("I Am Curious (Yellow)") which is protected from interference under the First and Fourteenth Amendments' guarantees of freedom of expression.

2. Whether the system of prior restraint imposed on the exhibition of motion pictures by the Maryland censorship statute, on its face or as applied, exceeds constitutional limits.

3. Whether the First and Fourteenth Amendments prohibit multiple State and local obscenity proceedings against a work adjudged by a federal court as a matter of constitutional law to be non-obscene and constitutionally protected in an action binding on the United States.

4. Whether application of the Maryland censorship statute to the exhibition of a film in a privately owned theatre for the benefit of adults who pay admission and voluntarily choose to view the film violates the First and Fourteenth Amendments under the constitutional principles applied in *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

5. Whether the procedures followed in this case by the Maryland State Board of Censors and by the courts below failed to meet constitutional standards.

STATEMENT

The motion picture "I Am Curious (Yellow)" was imported from Sweden on December 30, 1967, for distribution and exhibition throughout the United States. Shortly after arrival at Kennedy International Airport

in New York, it was seized by officials of the United States Bureau of Customs and forfeiture proceedings were instituted by the Government in the United States District Court for the Southern District of New York. The action was defended by appellant Grove Press, Inc. (hereinafter "Grove"), the importer and owner of the United States distribution rights in the film. After a jury trial, the District Court entered a judgment finding the film obscene, but upon appeal to the United States Court of Appeals for the Second Circuit, this judgment was reversed, and on November 28, 1968, eleven months after importation, a final order was entered, requiring the release of the film for distribution. *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (2d Cir., 1968), reprinted as Appendix D, pp. 47a-62a *infra*.

On February 18, 1969, prior to exhibition of the film in any theatre in the United States, Grove entered into a contract with appellant 5 West Amusement Co., Inc. (hereinafter "West"), an owner of motion picture theatres in Baltimore, Maryland, for the exhibition of the film at the 7 East Theatre in Baltimore (E. 502-503).[1] Pursuant to national distribution policy which Grove had adopted, and which it had represented to the United States Court of Appeals, the agreement provided that admission would be limited to persons 18 years of age and older (E. 503). The same representation was made to the Circuit Court for Baltimore City in this case (E. 503-504).

The film was distributed nationally, and it first opened in New York City on March 10, 1969. As

[1] "E" denotes the Joint Record Extract filed in the Court of Appeals of Maryland, copies of which have been filed with the Clerk of this Court.

of July 1, 1969, the evidence showed, it had been exhibited to more than 870,000 people in the cities of New York, Philadelphia, Washington, San Francisco, Los Angeles, Houston, Atlantic City, San Antonio, Miami Beach, Seattle, Norfolk, Boston and Portland.[2]

On July 1, 1969, Grove and West, reserving the right to challenge the constitutionality of the statutory requirements of prior submission,[3] made application to the Maryland State Board of Censors for a license for the exhibition of the film in Maryland. On July 8, 1969, the Board made an administrative determination that the film was obscene, disapproving the film and declining to issue the license (E. 10). With this determination as its jurisdictional requisite, the Board on July 11, 1969, petitioned the Circuit Court of Baltimore City, pursuant to Md. Code Ann., Art. 66A, § 19, for a judicial determination of the film's obscenity.

The petition was served upon appellants on Saturday, July 12, and on Tuesday, July 15, they filed a motion raising preliminary objection. The substance of the motion was that the prior judicial determination by the United States Court of Appeals for the Second Circuit operated to preclude further censorship proceedings based on the alleged obscenity of the

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[2] The film is currently being shown, or has already been shown, in the cities listed in Appendix I, p. 90a *infra*, and contracts have also been executed with exhibitors for showing in more than 50 additional cities, see also Appellants' Ex. 22. Current figures indicate that as of mid-November 1969, the film has been exhibited to more than 2,500,000 people in the U. S.

[3] Of the four States which were noted in *Freedman* v. *Maryland*, 380 U.S. 51, 59 n.5 (1965), as having motion picture censorship statutes, only Maryland still enforces a censorship law applicable to adults.

film (E. 11). On that same date appellants filed interrogatories requesting the Board to "[s]tate the names and addresses of all experts who were consulted by the Maryland State Board of Censors in connection with its review of the application for a license for the showing of the film," and to "[i]dentify which, if any, of the persons named in the answer to the preceding Interrogatory advised the Board that the dominant theme of the film taken as a whole is not an appeal to a prurient interest in sex or that the film is not utterly without redeeming social value" (E. 14-15).

The hearing began on July 16, 1969. In response to the request for interrogatories, counsel for the Board declared, "I am not prepared to state one way or the other whether there were experts who saw the film who advised the Board as [appellants' counsel] suggested they might have been advised." (E. 26) He also argued that the Board does not conduct normal "administrative proceedings," and that "we don't believe that it is up to us to give any aid and comfort to the defendant in this case to try to help him prove what he would like to prove, which I don't believe he is going to be able to prove, and we resist the motion" (E. 27). The trial judge initially reserved ruling on the requested interrogatories, and subsequently denied the request (E. 243). *Inter alia*, the court also denied the motion based upon the decision of the Court of Appeals for the Second Circuit on the ground that the courts of Maryland are not bound by a decision of a federal court of appeals and "there is no difference between the first and any other amendment in that respect" (E. 29-30).

The court then viewed the film[4] and heard the testimony of four witnesses for the State (E. 31-242).[5] Eight witnesses, including several heads of departments at institutions of higher learning, testified for the appellants.[6] The appellants also introduced reviews of the film from national magazines and newspapers of wide circulation (E. 244-553; E. 319, 553).[7]

On July 31, 1969, the Circuit Court for Baltimore City, after viewing the film a second time, entered a Memorandum Opinion and Order disapproving the film for licensing under the statute (E. 1-11). The Court noted that it "was impressed by the testimony of one witness, at least as I interpreted it, who testified that, in his opinion, this is a serious film strongly put together, confusing to some, but that it would not hold together without the sex scenes" (E. 8). The court then rejected the testimony of appellants' expert witnesses "and their explanations of the reasons for the various objectionable scenes" (E. 9) and found that the film was obscene under the three-pronged test of *Memoirs v. Attorney General*, 383 U.S. 413 (1966).

On appeal, the Court of Appeals of Maryland affirmed by a division of 4-to-3. The majority opinion, apparently giving special weight to "the visual impact of a motion picture as contrasted with the printed

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[4] A brief description of the film, which was submitted to the Court of Appeals of Maryland as an appendix to appellants' brief appears as Appendix F, pp. 66a-69a *infra*.

[5] The testimony of the States' witnesses is summarized in Appendix G, pp. 70a-79a *infra*.

[6] The testimony of the defense witnesses is summarized in Appendix H, pp. 80a-89a *infra*.

[7] The reviews follow page E. 567 of the Joint Record Extract.

word" (p. 8a *infra*), concluded that "the overriding theme is sex per se" (p. 6a *infra*) and "that its dominant theme, taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters" (p. 9a *infra*). The majority concluded that the film was "utterly without redeeming social value" because "the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience, was patently strained and contrived" (p. 9a *infra*). The majority also rejected the contention that the decision of the Court of Appeals for the Second Circuit foreclosed obscenity proceedings by the State on the ground that "only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us" (p. 13a *infra*).

Chief Judge Hammond and Judges McWilliams and Singley dissented in an opinion by Judge McWilliams which summarized the expert testimony offered in support of appellants' position as "an impressive array of witnesses . . . [including some] who . . . are considered to be the foremost authorities in this State on the motion picture. . . ." (p. 30a *infra*). The dissenters concluded that their views, and the views of serious movie reviewers "reflect at least a modicum of social value" (p. 31a *infra*), and they agreed with the opinions of Judges Hays and Friendly of the Court of Appeals for the Second Circuit that the film's social and sexual themes are interrelated.

THE QUESTIONS ARE SUBSTANTIAL

1. *The conflict of decisions.* The decision of the majority of the court below is in square conflict with the decision of the Court of Appeals for the Second Circuit in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196 (1968), in which two judges held that the same film could not be classified as obscene under the First Amendment because it could not be characterized as utterly without redeeming social importance. Review in this Court was not sought by the United States, and the decision of the Court of Appeals for the Second Circuit therefore binds the federal government for all purposes. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402-403 (1940); *Cromwell* v. *County of Sac*, 94 U.S. 351 (1877); *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F.2d 821 (S.D.N.Y. 1931). The contrary decision of the court below, if permitted to stand, would result in inconsistent treatment of the same film in federal and State courts within Maryland, as well as inconsistent treatment of the film among various jurisdictions.

"I Am Curious—Yellow" is presently the subject of litigation testing its alleged obscenity and/or the rights of its distributor and exhibitors to show it in twenty-three cases in thirteen different state jurisdictions.[8] The conflicting decisions of the United States Court of Appeals for the Second Circuit and the Court of Appeals of Maryland (as well as other inferior courts[9])

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[8] See Appendix E, pp. 63a-65a, *infra*.

[9] See, e.g., Commonwealth of Massachusetts v. Sotirios Karalexis et al.; State of Kansas v. Motion Picture Entitled "I Am Curious—Yellow," et al.; State of Washington v. National General Theatres, Inc., Grove Press, Inc. v. Robert B. Blackwell, et al., *infra*, pp. 63a-65a, Appendix E.

have, in these and many other jurisdictions, caused substantial deprivations of liberty and property, stimulated criminal and civil litigation, encouraged prosecutorial harassment and police intimidation of responsible theatre owners and their employees, and generated inconsistent administration of the law—all of which substantially impede the distribution and exhibition of the film, and result in immeasurable financial harm and other irreparable injury to these appellants, other motion picture exhibitors, and the adult film audience.

2. *The film is plainly not obscene.* The majority of the court below has prohibited the exhibition in Maryland of a Swedish motion picture, which already has been shown in over 50 cities in 25 states and the District of Columbia,[10] a film characterized by the trial judge as "a serious film strongly put together," on account of several "love scenes" which, the majority recognizes, are at times "introduced with some grace," and which comprise between six and ten minutes of the two-hour film. On the basis of its "independent" evaluation of these episodes and the remainder of the film—described by the majority below as "two story lines which strive to merge toward the end of the film, but never quite make it"—the majority below made the three findings deemed requisite for a conclusion that a work of literature or art is obscene in the constitutional sense. *See Memoirs v. Attorney General*, 383 U.S. 413, 418 (1966). The fundamental errors of the court below emerge from even a cursory examination of the

[10] See Appendix I, p. 90a *infra*.

film, the serious commentary and reviews it received,[11] and the expert testimony introduced at trial.

We submit that the misapplication by the majority below of the binding decisions of this Court in this area is plain enough that, upon the Court's examination of the opinions below, the film and the expert testimony, it would be appropriate for this Court to follow the procedure used in a number of recent cases involving proceedings against allegedly obscene matter, reversing the judgment below summarily on the authority of *Redrup v. New York*, 386 U.S. 767 (1967). See *Kuney v. New York*, 388 U.S. 440 (1967); *Friedman v. New York*, 388 U.S. 441 (1967); *Ratner v. California*, 388 U.S. 442 (1967); *Cobert v. New York*, 388 U.S. 443 (1967); *Shepard v. New York*, 388 U.S. 444 (1967); *Avansino v. New York*, 388 U.S. 446 (1967); *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448 (1967); *Rascoblom v. Virginia*, 388 U.S. 450 (1967); *Mazes v. Ohio*, 388 U.S. 453 (1967); *Schackman v. California*, 388 U.S. 454 (1967); *Potomac News Co. v. United States*, 389 U.S. 47 (1967); *Conner v. City of Hammond*, 389 U.S. 48 (1967); *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50 (1967); *Chance v. California*, 389 U.S. 89 (1967); *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968); *Robert-Arthur Management Corp. v. Tennessee ex. rel. Canale*, 389 U.S. 578

[11] For example, its social, moral and artistic importance was described at the customs trial in New York by Yale University Professor of Drama and *New Republic* film critic Stanley Kauffmann, *Newsweek* Film Critic Paul Zimmerman, *New Leader* and *Hudson Review* film critic John Simon, *Saturday Review* film critic Hollis Alpert, N.Y.U. Professor of Film James Beveridge, sociologists Ned Polsky and Charles Winnick, psychiatrists Edward Hornick and Tom Levin, and others.

(1968); *Felton v. City of Pensacola*, 389 U.S. 1098 (1968); *Henry v. Louisiana*, 392 U.S. 655 (1968).[12]

a. The majority below plainly misapplied the standards of *Roth v. United States*, 354 U.S. 476 (1957), *Jacobellis v. Ohio*, 378 U.S. 184 (1964), and *Memoirs v. Attorney General*, 383 U.S. 413 (1966). The *Roth* case stressed that "sex and obscenity are not synonymous" and required that the material alleged to be obscene be "taken as a whole" in determining whether its "dominant appeal" was to a prurient interest in sex. The majority below violated these tenets by baldly asserting that "the overriding theme is sex per se." That conclusion is refuted by (1) the majority's own finding that the film has "two story lines which strive to merge," (2) the fact that less than ten per cent of the

[12] A comparison of "I Am Curious—Yellow" with the materials found by this Court to be constitutionally protected in the above cases can leave no real room for the doubt that the film in issue here far outdistances, in terms of social importance, the matters at issue in the cited cases. The decisions involving films were *Ratner* ("Honey Bee"), *Gilbert* ("Jayne Palmer No. 2," "Jayne Tracy"), *I. M. Amusement Co.* ("Beautease Models"), *Robert Arthur Management Corp.* ("Mondo Freudo"), and *Schackman* ("peepshow" films). The remainder related either to magazines of the "girlie" or "nudist" variety—*Rosenbloom* ("Solis" and other nudist magazines), *Potomac News* ("Hellenic Sun No. II"), *Conner* ("Escapade," "Nude," "Rogue", etc.), *Henry* ("Gent," "Caper," etc.) and *Felton* ("magazines of the nudist variety") —paperback books with sexual themes *Keller* ("Sin Servant," "Lust School," "Lust Web"), *Coviglh Publications* ("Sin Whisper" and "bondage" material *Friedman, Shepard* and *Ingraham*. The dominant themes of burlesque films and nudist or girlie magazines might far more cogently be characterized as appeals to the prurient interest in sex than the theme of "I Am Curious—Yellow." A comparison of the exhibits alone compels a finding that reversal here follows *a fortiori* from the reversals following *Redrup*.

film's footage is devoted to the "story line" containing the "sexual scenes," (3) the reviews of the film received in evidence below, (4) the expert opinions to the contrary given by the only witnesses on film history and film technique who testified in this case,[13] (5) the

[13] The dissenting opinion summarized the expert testimony as follows:

Dr. Richard A. Macksey, Acting Director of the Humanities Center of the Johns Hopkins University, stated that he has taught more than a dozen different courses about films and film making and that he is a member of the Board of the Maryland Film Festival. He said the film is "concerned clearly with * * * conflicts between generations," "the doctrine of non-violence as this relates to Sweden's particular role in Europe" and with "the kind of malaise of the so-called welfare state in Sweden, the ostensibly classless society." The film, he continued, covered "a wide range of social attitudes" and had "artistic merit."

Dr. Lincoln F. Johnson, Chairman of the Fine Arts Department of Goucher College, has studied motion pictures seriously for 18 years and he regularly teaches courses in the history of motion pictures and film productions. He has served also on the selection body for the American Film Festival and he views "between 100 and 150" commercial films a year. He testified that the film has "cultural significance" and "cinematic merit."

Dr. Peter H. Rossi, a sociologist, is Chairman of the Department of Social Relations of the Johns Hopkins University. He has held editorial positions on three sociological journals and he has been a consultant to the Commission on Pornography and other national commissions as well. He testified that the film has "social significance" inasmuch as it is descriptive of the criticism by young people throughout the world of the present form of society. As Dr. Rossi put it:

> "Part of this addresses itself to criticism of the political structure that exists throughout the world, and we can see them in the film. The woman, Lena, not only criticizes the Swedish present government, but is critical of the Chinese, the Russians and the like. It is not a very articulated message. It is a film which says there is something wrong and it is a film which says also that young people like the heroine are searching for

testimony of thirteen experts who testified in the Southern District of New York as reported in the majority opinion of the United States Court of Appeals for the

> a new type of personal freedom, which will pull together in a rather honest way both the political life of the nations they live in and their personal lives."

Dr. Irving M. Brown, Director of the Fine Arts Program at the University of Maryland (Baltimore campus), has made a serious study of the theater arts. He testified that the film has "artistic merit" inasmuch as it made "a good try at some interesting forms, using a number of different frameworks and a number of themes; trying to do a number of things at the same time."

Dr. Ronald H. Paulson is professor of English and Chairman of the English Department of the Johns Hopkins University. Dr. Paulson stated that he views, on the average, two films a week and that he has published works on literary criticism. He further testified that "* * * this is a film with * * * artistic esthetic merit. It holds together; it is relatively coherent, judged by the very best movies; it is dealing with an important subject. * * * [the] breakdown in the relationship between the symbols of authority and the people, between parents and children." Moreover, he stated that the film has social merit "in the sense that it is dealing with important social problems."

Paroonir Stephany is Chairman of the Department of Photography and Films at the Maryland Institute and he teaches courses in film making and film history. Additionally, he has been Chairman of the Maryland Film Festival and he has appeared in court on three occasions to testify for the Board of Censors. He testified that the film has artistic merit and he offered the further comment that "[i]t is rather strongly put together" and "is certainly one of the outstanding films made within the last year."

The testimony of the State's witnesses was less impressive. Reuben Kramer testified that the movie was "totally inartistic" inasmuch as the sex scenes "contaminated the picture." He conceded that he does not regularly attend the movies and has no expertise in the "cinematographic art medium." Furthermore, he stated that in his opinion very few films have any artistic merit and "are just stupid." However, he indicated that this film "is not stupid."

William Forshaw, Senior Subjects Specialist in the Humanities Department of the Pratt Library testified that he is "interested in the preservation of American film" and is a film consultant and historian to the Baltimore Museum of Art. He stated that in his

Second Circuit in its evaluation of the same film (p. 49a *infra*), and (6) the conclusion of that court that "[w]hatever the dominant theme may be said to be . . . it is certainly not sex . . . not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful that interest in it should be characterized as 'prurient'" (p. 52a *infra*).

b. Even more blatant is the misapplication of the *Jacobellis* and *Memoirs* standard that "a work cannot be proscribed unless it is utterly without social importance." This appears not only from an independent viewing of the film, but from the opinions of the trial judge and the appellate court. For example, the trial judge noted he was "impressed by the testimony of one witness . . . who testified that, in his opinion, this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes" (E. 8). Similarly, the majority below found "that there are times when the love scenes are introduced with some grace" (p. 6a *infra*), and that the film included "attempts . . . to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience [sic]"—although it characterized the latter as "strained and con-

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opinion, which he described as a minority one among his colleagues, the film had no social or literary merit.

Dr. Paul Yaffe is employed by the Baltimore City Schools as Director of the Educational Testing Service. He is also a part-time practicing psychologist with "more than average ability in the area of projective techniques." He emphasized that he did "not pose as an expert of films, either from experience or study." Dr. Yaffe testified that in his opinion the film "pretended" to have socially redeeming value. He pointed out that "the socially meaningful situation is * * * shallow and if the film were to stand on it alone it could have no real redeeming features in the sense that it would be instructional or would clarify situations, and the like."

trived" (p. 9a *infra*). These findings in themselves compel reversal for they concede to "I Am Curious Yellow" as much in the way of "a modicum of social value" (383 U.S. at 420) as the "skill in characterization and . . . gift for comedy" which provided the basis for constitutional protection of John Cleland's *Fanny Hill* in the *Memoirs* case. As was noted in *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (Brennan and Goldberg, JJ.), "material dealing with sex in a manner that . . . has literary or scientific or artistic value . . . may not be branded as obscene and denied the constitutional protection." The finding of the majority below that there was a "contrived" relation between the sexual material and the rest of the film involved the court in an artistic judgment which was in direct conflict with the testimonial judgment of foremost authorities on the motion picture, (as well as the State's own literary expert).[14] The contrary conclusion of a majority of the Court of Appeals for the Second Circuit, of all thirteen experts who had testified in the Customs case and of a substantial minority of the court below is also supported by the views of nationally-known movie critics and by the many indications in the record below of the film's concern with the expression of ideas.

3. *The unconstitutional statute.* The Maryland censorship statute is unconstitutional on its face because it exceeds the limitations prescribed by this Court for a licensing statute in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Teitel Film Corp.* v. *Cusack*, 390 U.S.

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[14] A librarian at the Enoch Pratt Free Library in Baltimore, testified in response to the court's questions that the "political" or "social" story could *not* have been told "without these sexual scenes" (E. 241-242).

139 (1968), grants to the Board of Censors an overbroad and unconstitutional standard by which to disapprove films, and absolutely prevents the circulation even of non obscene films under penalty of fine and/or imprisonment.

a. Subsequent to *Freedman* v. *Maryland*, *supra*, the Maryland Legislature amended Section 19 of the censorship law to add a jail sentence to the penalties provided for non submission of a film and prescribe fixed periods of time in which the Board of Censors and a trial court must act so as to invoke the processes and sanctions of the law. In *Trans Lux Distributing Corp.* v. *Maryland State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965), the Maryland Court of Appeals held that this latter amendment fully satisfied the constitutional requirements of *Freedman*.

In *Trans-Lux*, the State court overlooked the fact that the amended statute sets no time limitation upon disposition of an appeal by the Maryland Court of Appeals. Hence the requirement of a "prompt, *final* judicial decision," prescribed in *Freedman* (380 U.S. at 59), is omitted from the Maryland procedure. The chronology of this case—in which (one month already having elapsed between the dates of submission and the lower court determination) more than six weeks elapsed between the dates on which the case was argued in the Maryland Court of Appeals and its disposition—demonstrates the type of delay which this omission generates and which the Court in *Freedman* correctly viewed would have a "potentially chilling effect . . . on protected expression," 380 U.S. at 61. In *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968), the Court concluded that a system allowing a possible delay of 50 to 57 days prior to judicial proceedings was consti-

tutionally defective; the same must be held as to a system which permits a comparable time period to elapse between oral argument of an appeal and a decision in the case, especially if it can operate, as here, to prevent exhibition of a film previously declared to be non-obscene by a federal circuit court of appeals.

b. Moreover, Section 6(a)(b) of the statute—the only definitional subsection which the Court of Appeals of Maryland has upheld against constitutional challenge[15]—grants the Board of Censors the authority to disapprove a film as "obscene" if "when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess." It is plain that this is not the constitutional standard for obscenity defined by this Court in *Memoirs* v. *Attorney General*, 383 U.S. 413, 418 (1966), in that it omits two of the three elements specified in the *Memoirs* opinion. Moreover, Section 6 incorporates the legal standard which was expressly disapproved in the *Memoirs* decision. It directs the Board of Censors to determine whether the "probability" of the sexual effect of a film "is so great as to outweigh whatever other merits the film may possess." This standard is contrary to the principle that "[e]ach of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness." 383 U.S. at 419.

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[15] See *Dunn* v. *Maryland State Board of Censors*, 240 and 249, 213 A.2d 751 (1965); *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967).

A system of prior restraint of motion pictures cannot be permitted to stand where the statutory criterion is so very much broader than what the Constitution allows. For in such a case there is no way of knowing whether the Board of Censors, which is the initial principal body vested with authority, is applying the constitutionally impermissible standard set out in the statute or the narrower definition of obscenity prescribed in the decisions of this Court and necessarily followed by the State courts.

The governing constitutional principle is the one applied by this Court in *NAACP* v. *Button*, 371 U.S. 415, 432-433 (1963): "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the dangers of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." In this case, as in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 514 (1964), the statute is unconstitutional on its face because it "sweeps too widely and too indiscriminately across" a constitutionally protected liberty. And here, as in *Aptheker* (378 U.S. at 515-517), the statute cannot be saved by narrowing judicial construction or by testing its application to the particular facts of each case. The "plain words" of Section 6 are clear, and the statute—like those in *NAACP* v. *Button*, *supra* and *Thornhill* v. *Alabama*, 310 U.S. 88 (1940)—impinges upon free speech and must therefore be judged as written, and not as judicially revised. That is the teaching of this Court's decision in *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968), where with respect to a vague film classification ordinance, this Court said, "The vice of

vagueness is particularly pronounced where expression is sought to be subject to licensing." 390 U.S. at 683.

c. The amended Maryland system is also defective because it subjects to summary criminal punishment persons alike who seek to exhibit non-obscene or obscene films, making no allowance for a refusal to submit to an extended process of previous restraint films believed by their exhibitors to be constitutionally protected and non-obscene, even as here where the belief is supported by a direct adjudication of that question by a high federal bench. In thus precluding a person from circulating material not yet found obscene or already found not-obscene, in a judicial proceeding—"subject only to later contempt proceedings—if the materials are obscene,"[16] the principles laid down by this Court in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436 (1957) are violated. The Maryland system erects an unconstitutional prior restraint because it can be applied as effectively to banish from the motion picture screens everywhere in Maryland not only "concededly obscene films," but assuredly protected, non-obscene films.

4. *The multiple local actions.*—The constitutionality of multiple State and local obscenity proceedings against literary or artistic matter which has been judicially determined, in an action binding on the United States, to be constitutionally protected is a substantial question which should be resolved by this Court. In *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), the Court noted that with respect to the "delicate and vulnerable" freedoms of speech and association, "[t]he threat of sanctions may deter their exercise almost as potently

[16] See "Free Speech And Obscenity: A Search For Constitutional Procedures and Standards", 12 U.C.L.A. Law Rev. 532, 536 (1966).

as the actual application of sanctions." See also *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-487 (1965). And in *Smith* v. *California*, 361 U.S. 147, 153-154 (1960), the principle that *scienter* was a constitutionally necessary element of a criminal prosecution against a vendor of obscenity was based on the proposition that any other rule would result in the restriction, by a bookseller's self-limitation, upon the distribution of constitutionally protected matter. The same reasoning was applied by this Court in striking down a vague film classification ordinance in *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 683-684 (1968), and an unduly burdensome scheme of film licensing in *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965). In each of these instances the Court was concerned with the discouraging effect that the challenged procedures could have upon distributors and exhibitors of constitutionally protected matter which might be subjected to "a protracted and onerous course of litigation." 380 U.S. at 59.

The same repressive effect on the exercise of First Amendment rights results if States and local jurisdictions are permitted to institute and maintain multiple proceedings, such as this one, against a film which has been conclusively and finally determined to be constitutionally protected, as the result of adversary litigation to which the United States is a party in a federal court.[17] The motion picture which is the subject of this case has been the subject of such harrassment, notwithstanding the searching analysis and reasoned final

[17] Such action appears also, under the principle of *Edwards* v. *California*, 314 U.S. 160 (1941), to create an unconstitutional burden on interstate commerce. Once admitted entry into the United States, a film should be free at least to enter any State, even assuming *arguendo* that the State retains some police power to bring criminal actions on account of the manner or circumstances of its local distribution, as suggested in *Redrup*.

rejection of the allegation of obscenity made by the Court of Appeals for the Second Circuit. The First and Fourteenth Amendments do not countenance multiple proceedings of this kind, with varying results as to the freedom of a film across state and county lines, and which disrupt and prevent the nationwide distribution of constitutionally protected motion pictures. See *Jacobellis* v. *Ohio*, 378 U.S. 484 (1964); *In re Giannini*, 72 Cal. Rptr. 655, 446 P. 2d 535 (1968).

5. *Rights of willing adult viewers*—It is abundantly clear from the record in this case that the circumstances under which the film is to be exhibited by the appellants are such that there is no "assault upon individual privacy . . . in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967). Only adults[18] who voluntarily elect to see the film will view it, and they are free to leave the theatre at any time if it does not meet their expectations.[19] Accordingly, this case presents the question whether the First and Fourteenth Amendments, as applied recently in

[18] Grove's contract with West requires that entry be denied to children (E. 503). Hence there is no basis on which to assert the State's "specific and limited concern for juveniles." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967). Compare *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

[19] There is not a scintilla of evidence in the record to support any conclusion that the "pandering" doctrine of *Ginzburg* v. *United States*, 383 U.S. 463 (1966), is applicable. The concurring judge's opinion (pp. 13a-26a, *infra*) is based on (1) strained inferences drawn from the quantity of photographs in the published scenario of the film and (2) the conclusions of a Kansas trial court on a different record involving different parties which was not even adverted to in this case. Moreover, there is no support in the *Ginzburg* opinion—and none, we submit, in the rationale of that decision, for the astounding proposition that prior restraint may be imposed on a film on the basis of a fear or prediction of *potential* "pandering."

Stanley v. Georgia, 394 U.S. 557 (1969), permit a State to prevent adults who wish to view an allegedly obscene film from fulfilling that wish in a privately owned theatre to which admission is restricted. We submit that there is no rational distinction between the right of a person "to satisfy his intellectual and emotional needs in the privacy of his own home" (*Stanley v. Georgia*, 394 U.S. 557, 565 (1969)) and his right to satisfy those needs in the privacy of a movie theatre whose owner is ready and willing to accommodate him and which is open to all who seek such satisfaction without intruding on the privacy or sensitivities of those who would be offended by it.[20] A three-judge federal bench in Massachusetts has now agreed with this proposition, and considered unconstitutional under *Stanley* a Massachusetts law in connection with a state proceeding in which an exhibitor of the instant film "I Am Curious-Yellow" was prosecuted, convicted, and sentenced to a one-year term of imprisonment. (The court's opinion by Circuit Judge Aldrich, is set out in Appendix K, pp. 103a-119a *infra*, together with the dissenting opinion of District Judge Julian.)

The "nuisance" theory of obscenity—which has long been espoused by scholars[21]—is supported by an anal-

[20] In this respect, this case is the converse of *Rowan v. United States*, No. 329, this Term, in which the Court noted probable jurisdiction on October 28, 1969. The statute at issue in *Rowan* has the effect of authorizing those who are offended by allegedly obscene material to terminate its delivery to them. This case involves the right of *willing* recipients and views to satisfy their wants.

[21] See, *e.g.*, Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Colum. L. Rev. 391, 393 (1963); Packer the Limits of the Criminal Sanction 324 (1968); Moreale, *An Analysis and Statutory Proposal*, 1969 Wisc. L. Rev. 42. See also the discussion of Stanley v. Georgia in *The Supreme Court, 1968 Term*, 83 Harv. L. Rev. 7, 147-154 (1969).

xsis of this Court's decisions in the area of obscenity and other "offensive" speech from *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572 (1942), *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (1952), and *Winters* v. *New York*, 333 U.S. 507, 515 (1949) to *Redrup* v. *New York*, 386 U.S. 767 (1967), and *Stanley* v. *Georgia*, 394 U.S. 557 (1969). Under that theory, the judgment below cannot stand.

6. *Suppression of favorable leads.* The denial by the Circuit Court judge of the appellants' request for the names of the experts who had been consulted by the Board of Censors violated the appellants' constitutional rights in that it withheld from the appellants information concerning testimony likely to be favorable to the appellants but known only to the State's attorney. See *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Giles* v. *Maryland*, 386 U.S. 66 (1967). Reports of expert witnesses are covered by the *Brady* rule (*Barbee* v. *Warden*, 331 F.2d 842 (4th Cir. 1967)), and they may not be knowingly withheld from the defense.

The fact that this was not nominally a criminal proceeding is no answer to this contention. In the first place, a failure to submit to the proceedings can result in a criminal conviction of the exhibitor. Moreover, it is entirely clear that the effect of the trial court's disapproval was the same as a forfeiture of the film in that it precluded its use and exhibition within the State. Forfeiture proceedings are, of course, "quasi-criminal in character" (*Boyd* v. *United States*, 116 U.S. 616 (1886); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965)), and the safeguards applicable in criminal proceedings are constitutionally mandatory here as well.

In addition, the conclusions of the Board of Censors are constitutionally invalid because they are based on no administrative record and on no specific evidence whatever. All the record contains is the bare conclusion of the Board, and there is, therefore, no opportunity for a meaningful determination as to whether it carried out its statutory responsibility. This Court's ruling in *Freedman* v. *Maryland*, 380 U.S. 51 (1965), was surely not intended to give the Board of Censors so wide a range in which to roam. If the fixing of precise standards for an administrative system of prior restraint is to have any meaning at all, it must at least require the censor to keep a record which will demonstrate that the constitutional and statutory standards have been met.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

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APPENDIX A

IN THE
COURT OF APPEALS OF MARYLAND
SEPTEMBER TERM, 1969.

No. 212

HOWARD WAGONHEIM, Agent; GROVE PRESS, INC.; 5 WEST AMUSEMENT CO., INC.

v.

MARYLAND STATE BOARD OF CENSORS

Hammond, C.J.
Marbury
Barnes
McWilliams
Finan
Singley
Smith,
JJ.

Opinion by Finan, J., Barnes, J., Concurs. Hammond, C.J., McWilliams and Singley, J.J., Dissent.

Filed: October 22, 1969

This is an appeal from an order of the Circuit Court of Baltimore City (Carter, J.) directing that the motion picture film entitled, "I Am Curious (Yellow)" be disapproved for licensing as being in violation of the provisions of Code (1957), Art. 66A, § 6, in that the film

"meets the tests of obscenity previously laid down by the Courts * * *."[1]

The primary issue before this Court is whether this film is protected matter under the First Amendment of the United States Constitution. We think not and accordingly affirm the action of the lower court.

This film was produced by Sandrew, a Swedish studio, and was directed by Vilgot Sjoman, a protégé of Ingmar Bergman. Its producers would claim that it represents a kaleidoscopic portrait of Sweden, portraying problems and trends on the contemporary social and political scene. An effort has been made to develop the film along two story

[1] On July 11, 1969, the Maryland State Board of Censors filed a petition pursuant to Section 19 of Article 66A of the Annotated Code of Maryland (1967 Replacement Volume) for judicial determination as to whether a certain motion picture titled "I Am Curious (Yellow)" is entitled to be exhibited within the State of Maryland considering the provisions of Section 6 of Article 66A of the said Code. This film was submitted to the Board for examination and licensing on July 1, 1969, by the applicant, Howard Wagonheim and Grove Press, Inc., "manufacturer." The Board viewed the film on July 8, 1969, disapproved it under the provisions of Section 6 of Article 66A of the Code. The Order of disapproval read as follows:

> "After reviewing the entire film, and considering it as a whole, the Board finds that the film goes substantially beyond customary limits of candor in description and representation of sex, that it deals purposely and effectively with sex in a manner which appeals to the prurient interest that it is without social importance, and that it lacks any identifiable artistic, cultural, thematic or other value which might be considered redemptive."

The lower court viewed the film and listened to the testimony of witnesses for approximately two weeks and reviewed the film a second time prior to rendering its opinion. The film was viewed by this Court as required by Art. 66A, § 19(a) on September 8, 1969, prior to hearing argument by counsel representing the appellants, Howard Wagonheim, Agent; Grove Press, Inc.; 5 West Amusement Co., Inc., and the appellee, Maryland State Board of Censors.

lines which strive to merge toward the end of the film, but never quite make it. The total effect is that the whole presents more of a framework than a plot.[2] The film was the subject of a decision by the United States Court of Appeals for the Second Circuit in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2nd 196 (1968). The court in a two to one decision found it to be constitutionally protected. Judge Hays, in writing the majority opinion, made the apt comment that: "As with many other contemporary artistic productions there can be a difference of opinion as to what the picture is 'about'." *Id.* at 198. Various critics and experts who have written and testified concerning the film characterize it as a quest for identity with reality, on the part of the young heroine, amidst the shifting sands of social, moral, political, economic, and cultural transition. Her search for identity has been billed as representative of the younger generation in Sweden, their hope for a classless society, their adherence to non-violence, and their demonstrable hostility against the Franco-type totalitarian state.

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[2] The main characters in the film are "Lena," a young drama student, "Borje," a young actor, and "Vilgot," the director. The three are making a film together. In making the film Lena, having become interested in Borje, finally leaves the director, to whose apartment she has ready access, to take up with Borje. In the meantime the film gradually reveals her life as a young girl who lives with her frustrated father in a picture frame shop. Lena is disillusioned with her father, who in his idealistic youth went to fight in the civil war in Spain and who became frightened and fled. Lena endeavors to convey the impression that she is carrying on the protest which her father gave up and much of the film shows her scurrying about Sweden interviewing people about political and ethical attitudes. She pickets and protests some of the political and social situations, seeks sexual freedom of a sort enjoyed by men, and in one sequence rebels violently against Borje, who conceals from her his love life with other women. In a dream fantasy she shoots him and then castrates him. All of this is put together in collage form.

The film in reaching for its social message employs the "man on the street" interview format, with Lena accosting persons from all walks of life, questioning them about their social and political beliefs. However, when the viewer ultimately realizes that the sexual scenes have little or nothing to do with what was developed by the "cinema verite" technique, not only do the sexual sequences appear artifically interjected into the film, but in retrospect, the many interviews seem a contrived ruse to give the movie social value. As one of the expert witnesses called by the State, Dr. Paul Yaffe, tersely put it: "Basically you have two themes running parallel, one never touching the other. Basically, one is this phony setting of class values and class structures and class problems. The other is the sexual activity of an episodic nature."

The matter of the plot was also the subject of comment by Chief Judge Lumbard in his dissent in the Second Circuit opinion wherein he stated: "The sexual aspect of the film does not arise from the plot, *as that is non existent* (emphasis supplied); it arises from the decision by the director, Vilgot Sjoman, to produce a film which would shock the audience. He testified that in making the film he deliberately broke sexual taboos or cliches knowing that this would be shocking to the public." *Id.* at 203.

There are several brief interviews with the late Dr. Martin Luther King, wherein he comments on his non-violent methods, and with the Russian poet Yevgeny Yevtushenko. However, these appear to be part of a facade for the main objective of the picture, namely to purvey shocking and titillating sexual sequences. As Judge Friendly stated in his concurring opinion in the Second Circuit "* * * a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms." *Id.* at 201.

Again, quoting from Judge Hays in the Second Circuit opinion:

> "It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts." *Id.* at 198.

Actually, the film vividly depicts six different acts of sexual intercourse in various positions and locales. Among the more unusual scenes is an episode of copulation in the crook of a tree; a second occurs on the balustrade of the royal palace in Stockholm in rhythm to the Swedish national anthem, while a distraught sentry endeavors to stand at attention as he views the efforts of the two out of the corner of his eye. This is considered one of the humorous episodes of the film. There are a number of scenes depicting complete nudity of the male and female leads, including numerous views of both the female and male genitals. There are representation of fellatio and cunnilingus, as well as the suggestion of sodomy in one of the intercourse scenes, and of castration in the fantasy scene.

The dialogue is entirely in Swedish with English subtitles. The English translation of the Swedish dialogue, as contained in the scenario which was filed as an exhibit, reveals that the translation in many instances goes beyond that contained in the English subtitles from the standpoint of use of lascivious expression.[3]

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[3] The Attorney General in his brief for the appellee lists the following instances of uncommon sex in the movie: (1) Lena's singing "In Rio de Janeiro you can fuck for free"; (2) the display of erotic Indian sculpture depicting a man with his hand on a woman's vagina; (3) the discussion between Lena and another girl about different methods of masturbation; (4) Lena's dialogue, "Are you that fucking

In fairness to the film it should be stated that there are times when the love scenes are introduced with some grace and a discussion of them in an opinion might tend to represent them too crudely out of context. However, the overriding theme is sex per se, although perhaps not presented with the abruptness as might appear from the written word.

This Court in *Hewitt* v. *Maryland State Board of Censors*, 254 Md. 179; 254 A.2d 203 (1969), a case in which the

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stupid?"; (5) detailed love making scene in Lena's room showing both parties completely naked, exposing the male genital area, showing attempted intercourse standing against a wall and also a scene of Borje caressing the girl's breasts with his tongue; (6) scene depicting sexual intercourse between Borje and Lena on the palace balustrade in which, although the parties are clothed, the act of intercourse is vividly displayed; (8) scenes of nudity at the retreat and scene depicting Lena looking at a sex manual showing various unusual positions for sexual intercourse; (9) scene at the retreat showing Borje throwing Lena to the ground and committing an act of cunnilingus, followed by a scene depicting the parties both completely nude with Lena kissing Borje's penis as he caresses her vagina; (10) a discussion regarding sex which "makes them both horny"; (11) scene depicting intercourse in the water; (12) scene depicting sexual intercourse in a tree between Lena and Borje; (13) scene showing fully the naked bodies of the two lying on the floor engaged in either sodomy or sexual intercourse with the man behind the woman. This scene also dramatically emphasizes the erotic effects of the copulation; (14) followed by a scene fully showing Borje's genitals, followed by a scene in which the nude Borje chases the nude Lena from one room to another, throws her to the floor and mounts her in a position of sexual intercourse. They then are shown with loins entangled, copulating on the floor; (15) fantasy scene in which Lena shoots Borje and castrates him with a knife; (16) Lena's dialogue: "He's a big fucking shit and I'll kill him when I get hold of him. I'll cut off his cock"; (17) nudity at the clinic with again an emphasis on the genital area of the male and female."

film "Odd Tastes" was disapproved for licensing, had occasion to again set forth the legal test for obscene films. Judge Barnes writing the opinion for the Court stated:

> "Our definition of obscenity—the *Roth-Alberts* test—was restated with somewhat different emphasis perhaps, by the Supreme Court in *A Book Named 'John Cleland's Memoirs of A Woman of Pleasure' v. Attorney General*, 383 U.S. 413, 418, 86 S. Ct. 975, 977, 16 L. Ed. 2d 1, 5-6 (1966), hereinafter referred to as *Memoirs*, in which Mr. Justice Brennan, for the Supreme Court, stated:
>
> > 'We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.'
>
> "We recognized and applied this latest statement of the applicable rule in *Samza v. Maryland State Board of Censors*, 245 Md. 319, 326-27, 226 A.2d 317, 320-21 (1967), in which we sustained the Circuit Court and the Board in their finding that certain films, shown in an arcade in 'the Block' in Baltimore, were obscene. * * *." *Id.* at 182-83.

See also *Redrup v. New York*, 386 U.S. 767, 770, 771 (1967).

Applying the tridentated test of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966), as adopted by this Court in *Heueitt, supra, and Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967), and set forth above, we find the film qualifies as obscene under all three categories. In arriving at this conclusion we cannot ignore the visual impact of a motion picture as contrasted with the printed word. *I Am Curious-Yellow, supra* (Lumbard, J., dissenting); *Freedman* v. *Maryland*, 380 U.S. 51 (1965). Cf. *Landau* v. *Fording*, 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456 (1967).

It should be noted that this is not a case wherein we are bound to follow the ruling of the lower court unless we find it to be clearly erroneous (Maryland Rule 886 a), but rather the duty of this Court is to make an independent constitutional judgment on a mixed question of law and fact, as to whether the subject matter before us is obscene. This obligation was cogently expressed by Judge Oppenheimer, writing the opinion of this Court in *Sanza, supra*, wherein he stated:

> "In determining whether the films are obscene, we are deeply mindful of our obligation to make an independent constitutional judgment on the facts of the case, *Jacobellis, supra*, at 378 U.S. 190, and that the administration of a censorship system for motion pictures presents peculiar challenges to constitutionally protected speech. *Freedman, supra, at* 380 U.S. 57. We are mindful too that "we are judges, not literary experts or historians or philosophers,' *Fanny Hill, supra*, concurring opinion of Mr. Justice Douglas at 383 U.S. 427, and that ordinarily neither the judge who may sit in the circuit court review the action of the Board nor the judges of this Court would be quali-

fied to determine whether a film fails to meet the three tests laid down in *Roth-Alberts* without enlightening testimony. *Dunn, supra,* 240 Md. at 255." *Id.* at 320.

In addition to viewing the film we have reviewed the testimony of the many experts contained in the record representing views, both pro and con, as to the social, artistic and cultural attributes of the film or the lack thereof. The witnesses for the petitioners, as well as the exhibitor, were individuals who possessed respected artistic, educational and cultural backgrounds in the Baltimore area. We see little need to repeat their opinions but want it known that we have considered them in reaching our conclusions.

This Court has little difficulty in finding that the dominant theme of the film, taken as a whole, appeals to a prurient interest in sex and is patently offensive in that it affronts contemporary community standards relating to the description or representation of sexual matters. It is only with regard to the third element of the "Roth-Alberts" test as set forth in *A Book* v. *Attorney General, supra,* which must coalesce with the other two standards, which presents any occasion for pause. However, after reviewing all of the evidence in a light most favorable to the appellants' contention that the film does have something of social value, it is our judgment that it is utterly without redeeming social value. We have previously, in this opinion, stated that the attempts of the film makers to use social questions to depict the restlessness of youth and its search for identity, against an intellectual ambience, was patently strained and contrived. We do not think that Lena's concern with social and political problems, so artificially depicted, supplies the redeeming social quality required to sustain the film. We find no meaningful nexus between this concern and her problem with her

twenty-three lovers. As was stated by Judge Lumbard in his dissent[1] in *I Am Curious, supra*:

> "Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.
>
> "While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture." *Id.* at 203,

or as Judge Murphy, who presided in the United States District Court for the Southern District of New York at the trial of *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 285 F. Supp. 465 (1968) observed:

> "If the film has a message, whether it is public poll taking on the social structure of the Swedish

[1] On October 6, 1969, the United States District Court for the District of Kansas had before it the cases of Grove Press, Inc. v. Kansas and Lakeside Drive In Theatre, Inc. v. Menghini, et al. (Nos. KC-2992 and KC-2997), wherein the obscenity statutes of Kansas were challenged and injunctions were sought to enjoin proceedings pending in the District Courts of Johnson County and Wyandotte County, Kansas, and which proceedings concern the question of the application of the Kansas statutes to the film "I Am Curious (Yellow)." The Court found the statutes constitutional and did not reach the obscenity question. However, the Court stated that "All Judges on the present Court agree with Judge Lumbard's statement [dissent], but because we did not reach the question, we do not so hold."

> society or the advocacy of non-violence or anti-Francoism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hardcore pornography." *Id.* at 472.

Finding nothing in this film that merits the protection of the First Amendment of the United States Constitution, we are of the opinion that it should be disapproved for licensing under Maryland Code, Article 66A, Section 6.

The appellants raised other issues of a technical nature which we shall proceed to discuss.

The appellants complain that at the hearing in the lower court, the trial judge refused to order the Attorney General's office to disclose the names of all the experts which they requested to view the film. An analogy is made to the situation where due process of law requires that the State, upon request, divulge all evidence favorable to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); *Barbee v. Warden*, 331 F.2d 842 (4th Cir., 1964); *United States v. Poole*, 379 F.2d 645 (7th Cir., 1967); *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

It is not disputed that the hearing before the lower court in censorship cases is of an adversary nature. In the instant case the appellants requested not only the names of the actual witnesses which the State proposed to use at the hearing, but all of the individuals who may have been requested by the State to view the film for the possible purpose of being used as a witness, or for consultation with the State concerning *the obscene aspects* of the film. We do not think that discovery in civil cases as promulgated by Maryland Rule 417 goes to that which is in essence the work product of the attorney accumulated in the preparation of the case. Furthermore, if it were to be contended that Maryland Rule 728 relating to discovery in criminal cases were applicable, we think the opinion of this Court in *Kardy v. Shook, J.*, 237 Md. 524,

540, 207 A.2d 83 (1965) dispositive of the issue, wherein Prescott, C.J., writing for the Court stated:

> "* * * And, in *Williams v. State*, 226 Md. 614, we held that where a demand for a bill of particulars went far beyond what was required under Rule 728 and was calculated, not so much to amplify the allegations of indictment, but 'to require complete disclosure by the State of the evidence it relied upon,' the court was justified in sustaining the State's exceptions to the demand." *Id.* at 540.

The appellants also attacked the constitutionality of the prior restraint procedure provided by the Maryland Statute (Art. 66A). We think these contentions were generally answered by this Court in *Trans Lux Distrib. Corp. v. State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965), which reviewed the Maryland Statute in light of its amendment by Chapter 598 of the Acts of 1965, which amendment had the effect of revising Section 19 of Article 66A to conform to the guidelines suggested by the United States Supreme Court in *Freedman v. Maryland*, 380 U.S. 51 (1965).

The appellants further contend that the Board acted with insufficient evidence to sustain its refusal to license the film and that because of this the lower court lacked jurisdiction to enter an order disapproving the film. Without entering into a prolonged discussion, as to whether the administrative procedure followed by the Board is not subject to review where it is clear that there has been a *de novo* judicial determination, *Universal Film v. Chicago*, 288 F. Supp. 286 (1968), we think that the Board made a conscientious effort to follow the guidelines set forth in *Hewitt v. Board of Censors*, 243 Md. 574, 585, 586, 221 A.2d 894 (1966), and that there was sufficient expert testimony on which it could properly base its decision.

Finally, the appellants argue that the judgment of the United States Court of Appeals for the Second Circuit in

I Am Curious (Yellow), supra, is conclusive on the State's case, in that the federal statute under which adjudication was made must be read as preempting the right of a state later to subject the film to further restraint in advance of public showing. The short answer to this is that the United States Supreme Court in *Freedman* v. *Maryland, supra,* recognized that as long as a state follows the procedural safeguard suggested therein, it may validly exercise its police power to effectuate a censorship system. It is our belief that only an adjudication by the United States Supreme Court would be binding upon this Court with regard to the film before us. Constitution of Maryland, Declaration of Rights, Article 2.

In affirming the lower court's order disapproving the film "I Am Curious (Yellow)" for licensing on the basis that it is obscene, we are mindful of Justice Stewart's observation in *Ginzburg* v. *United States,* 383 U.S. 463, 498 (1966) that, "Censorship reflects a society's lack of confidence in itself"; yet, we are likewise sensate to our obligation to withhold the protection of the First Amendment from material which those who wrote the Constitution never intended to protect.

ORDER AFFIRMED, APPELLANTS TO PAY COSTS.

Barnes, J. concurring:

I entirely concur with the reasoning, statement of facts and application of the law in the opinion of the Court. I *am of the opinion,* however, that (a) additional emphasis should be given to the pandering aspect of the case when the third test of "utterly without redeeming social value" is considered and (b) there should be additional comment upon the scope or applicability of this third test when the Court has before it a motion picture which is obscene under the first two tests in regard to prurient interest in sex and an affront to contemporary community standards.

(a)

In the majority opinion, in considering the third test, the pandering aspect of the case is suggested by the observation that the film makers' attempt to raise so-called "social questions" was "patently strained and contrived" and the result was so "artificially depicted" as failing to supply the "redeeming social quality required to sustain the film." The majority opinion also cites with approval a portion of Chief Judge Lumbard's dissenting opinion in *United States* v. *A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F.2d 196, 202, in which he states, "Needless to say these acts (of fellatio and cunnilingus) bear no conceivable relevance to any social value, except that of *box office appeal.*" (Emphasis supplied.) *Id.* at 203. With these observations, I heartily concur, but I would additionally emphasize that the record discloses to me that there is substantial evidence which indicates the pandering of sex. This pandering, in my opinion, brings the present case within the ambit of the decision of the Supreme Court of the United States in *Ginzburg* v. *United States*, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966).

In *Ginzburg*, there was a clear majority of five justices for the opinion of the Court, *i.e.*, Mr. Justice Brennan, who wrote the majority opinion, with the concurrence of Warren, C.J., Clark, White and Fortas, J.J. Justices Black, Douglas, Harlan and Stewart dissented and each wrote dissenting opinions.

The opinion of the Supreme Court in *Ginzburg* stated:

> "This evidence (of advertising), in our view, was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving

intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the circumstances, pretense or reality—whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." (383 U.S. at 470, 86 S.Ct. at 947, 16 L.Ed.2d at 38)

We cited and followed *Ginzburg* in *Sanza* v. *Maryland State Board of Censors*, 245 Md. 319, 226 A.2d 317 (1967) and recently in *Hewitt* v. *Maryland State Board of Censors*; 254 Md. 179, 193-95, 254 A.2d 203, 210-211 (1969), involving the motion picture "Odd Tastes."

The pandering of sex in the present case is not of the same nature as that involved in *Ginzburg* and the evidence in regard to it is not as clear and definite as was the evidence in *Hewitt*, *supra*. In the instant case the pandering aspect is more subtle, but it is present none the less.

In the scenario, which apparently is prepared for sale in conjunction with the motion picture, there is an obvious emphasis on the sexual aspects of the motion picture revealing as its object the "material gain for the creator through an appeal to the sexual curiosity and appetite."

Ginzburg, supra, 383 U.S. at 471, 86 S.Ct. at 947-948, 16 L.Ed.2d at 38. It is apparent from looking at the scenario that there is a larger proportion of photographs of the sexual scenes than in the motion picture and Dr. Macksey, an expert witness for the appellants, stated, in effect, that the use of the series of stop action frames depicting the sexual scenes served to emphasize the sexual theme in the motion picture. In my opinion, these facts bring the present case within the *Ginzburg* decision which indicated that the animation of sexual detail to give the publication in that case a salacious cast amounted to an appeal to the sexual curiosity and appetite and amounted to the pandering condemned in that case.

The Attorney General aptly commented on this aspect of this case in the lower court:

> "You have a book on the cover says 250 illustrations. If you count the illustrations in this book, you will find approximately 100 of the 250 have to do with sexual themes, out of the 250. That is 100 out of 250, which is forty percent of the total against six minutes of 120 minutes or 135 minutes of the film, and if you will look you will find that in a period of some —pages 89 to about 160, you have some 83 or 80 sexual pictures against 60 others, which is about a hundred and twenty-five percent, which indicates there is a very significant emphasis on the pornography we say is in the film in this book, * * * ".

It thus appears that the pandering of sex in the motion picture is generated entirely by the profit motive. By the concentration on sex in the scenario, Grove Press sells the book and by selling the book it sells the sex in the motion picture.

The argument by the appellants (if relevant at all) that the motion picture will be shown only to those members of the community 18 years of age or older is rather

impaired by the findings by the District Court of Johnson County, Kansas, in a recent case entitled "*The State of Kansas* v. *A Motion Picture Film Entitled 'I Am Curious—Yellow'*", No. 6122, Div. No. I, in which the Order was filed on September 5, 1969, and modified in a detail of no importance for this case on September 15, 1969. A copy of the opinion of District Judge Herbert W. Walton in this Kansas case was forwarded to this Court by the Attorney General on October 1, 1969, a copy being sent to counsel for the appellants. In the Kansas case, the motion picture involved in the case at Bar was shown at the Kimo South Theatre (an "art theatre") in Overland Park, Johnson County, Kansas. Advertisements furnished by Grove Press for the motion picture published in the Kansas City Times and the Kansas City Star from June 17 to June 24, 1969, stated, "Admission restricted to adults." The motion picture was advertised as "'a landmark likely to permanently shatter many of our last remaining movie conventions,' says William Wolfe of Cue Magazine." In none of the advertisements, other than the one of June 21, 1969, was there mention of any other theme. The District Court found that although the advertisement on June 21 mentioned such "alleged themes as politics, nonviolence, Zen, commitment, socialism and other subjects, the whole import of the advertisement and the attention of the reader are centered on the obvious and purposeful deletion which implies the word 'sex.'"

In the newspaper advertising of June 18, 1969, no mention was made at all of age restrictions; on June 19, 20 and 21, there was a restriction to persons over 18 years of age with suitable identification; on June 22, there was a restriction to those 18 years and over; and, on June 23 and 24, the advertisements simply stated "adults only."

The enforcement officers took random samplings on the evenings of June 22, 23 and 24, 1969, among persons leaving the theatre (which seats approximately 325 persons)

who appeared to be under 21 years of age. One officer on Sunday, June 22, stopped 10 persons, three of whom were under 21 years of age; of the persons stopped by the other officer on the same night, seven were under 21 years of age. On Tuesday evning, June 24, from those stopped six were under 21 years of age and of those, three were under 18 years of age. On June 22 also, the ticket seller at the theatre sold a ticket to view the motion picture to an identified lad, 17 years of age, without asking the youth his age or asking to see his identification. The lad was thereafter admitted, the ticket taker neither asking his age nor for any identification. There were similar episodes on June 24, 1969.

The Contract of May 18, 1969, between Dickinson Operating Co., Inc. through Glen W. Dickinson, Jr. and Grove Press, Inc. through Barney Rosset, one of its chief officers, to exhibit the motion picture at the Kino South Theatre provided that Grove Press, Inc. would receive 90% of the gross receipts in excess of $1,500 a week, but not less than the following fixed percentages: first week: 70%; second and third weeks: 60%; fourth and fifth weeks: 50%; sixth week: 45%. The minimum run was to be for six weeks with additional time to be negotiated. Grove Press, Inc. was to pay 90% of the advertising costs and all advertising materials content and costs were to be at the discretion of Grove Press, Inc. The contract further provided that Dickinson Operating Co., Inc. was to exhibit the film in its entirety and was not to cut or alter the print, other than to make necessary repairs or when required by a public official or authority, x without the written consent of Grove Press, Inc.

(b)

As the majority points out, we applied the *Roth* test as restated and amplified in *Memoirs* to a motion picture in *Hewitt* v. *Maryland State Board of Censors*, 254 Md.

179, 182-83, 254 A.2d 203, 205 (1969), *supra*, and the restated "rule" has been applied in the present case. In my opinion, in view of the uncertainty in regard to the view of a majority of five justices of the Supreme Court on various aspects of the applicable test, it was wise for us in *Hewitt*, *supra*, as well as in the instant case, to apply the most detailed and comprehensive test enunciated by the justices writing for a majority or a plurality of the Supreme Court in the obscenity cases in that Court. As I have indicated, it is my opinion that the film in the case at Bar is well within the three tests mentioned and is obscene under those tests.

The able argument of the Attorney General and of the Assistant Attorney General, both in the appellee's brief and orally before us, has made me doubt, however, that the third test *i.e.*, that the material is "utterly without redeeming social value" at least in its full vigor is properly applied to a motion picture because of the difference between motion pictures, on the one hand, and novels, pamphlets and other writings, on the other.

As early as 1952 when the Supreme Court first applied the provisions of the First Amendment in regard to freedom of speech and of the press to motion pictures ("The Miracle"), in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, Mr. Justice Clark, speaking for the Supreme Court (Reed and Frankfurter, J.J. concurring; there were no dissents) observed the difference between the two methods of expression, as follows:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and at all places. That much is evident from the series of decisions of this Court with respect to other media of communication of ideas.

> Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems." (343 U.S. at 502-503, 72 S.Ct. at 781, 96 L.Ed. at 1106)

Mr. Justice Clark in his concurring opinion in *Kingsley Pictures Corp.* v. *Regents* ("Lady Chatterley's Lover"), 360 U.S. 684, 702, 79 S.Ct. 1362, 1372, 3 L.Ed.2d 1512, 1524 (1959) stated:

> "I see no grounds for confusion, however, were a statute to ban 'pornographic' films, or those that 'portray *acts* of sexual immorality, perversion or lewdness'." (Emphasis in original.)

Mr. Justice Brennan, for a unanimous Supreme Court, stated in *Freedman* v. *Maryland*, 380 U.S. 51, 60-61, 85 S.Ct. 734, 740, 13 L.Ed.2d 649, 656 (1965) that:

> "The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression."

This difference is also recognized in the opinion of Circuit Judge Hays, in the Second Circuit case involving the film in this case in which it is stated:

> "No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books." (404 F.2d at 198)

In the State Courts the distinction between the two methods of expression has been carefully and fully pointed out. In *Landau* v. *Fording*, 245 Cal. App.2d 820, 54 Cal. Reptr. 177 (1966) the appellate court for California stated:

> "Furthermore, we think that the constitutional protection afforded does not mean that the visual impact

of a motion picture as distinguished from other media can be disregarded. Films are obviously different from other forms of expression (*Freedman* v. *Maryland*, 380 U.S. 51, at p. 61 [13 L.Ed.2d 649, 85 S.Ct. 734]). The significance of the motion picture medium is due to the technological features of the particular medium. The unique combination of sight and sound that characterizes a motion picture makes the ideas presented by movies comprehensible to a larger audience than is the case in any other medium except television (see materials cited in 60 Yale L.J., 696, fns. 27 and 28, at pp. 707-708, and 42 Cal.L.Rev., 122, fn. 53, at p. 128). Even in the absence of sound, movies assure a high degree of attention and retention. The focusing of an intense light on a screen and the semi-darkness of the room where distracting ideas and suggestions are eliminated contribute to the forcefulness of movies and their unique effect on the audience (60 Yale L.J., *supra*, at p. 708).

"Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word." *Id.* at 181.

See also the interesting discussion of this matter by the Court of Appeals of New York in *Trans-Lux Dist. Corp.* v. *Board of Regents*, 14 N.Y.2d 88, 248 N.Y.S.2d 857 (1964), *rev'd per curiam*, 380 U.S. 259, 85 S.Ct. 952, 13 L.Ed.2d 959 (1965) citing only *Freedman* v. *Maryland*, *supra*, from which it can be inferred that the reversal by the Supreme Court was on the basis of the procedural inadequacy of the New York statute and that the Supreme Court did not consider the issue of obscenity. Cf. *Teitle Film Corp.* v. *Cusack*, 390 U.S. 139 (Note 1), 88 S.Ct. 754, 19 L.Ed.2d 966 (1968) in which the Supreme Court held a Chicago

statute invalid under *Freedman*, but noted that it had not considered the issue of obscenity.

The *Roth* test was "*whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*" and it is the *only test* in which a *majority of five justices* of the Supreme Court have ever agreed.

In the *Roth* case, 354 U.S. 476, 483-485, 77 S.Ct. 1304, 1308-1309, 1 L.Ed.2d 1498, 1506-1507 (1957), the Supreme Court stated:

> "... the unconditional phrasing of the First Amendment was not intended to protect every utterance ... All ideas having even the slightest redeeming social importance ... have the full protection of the guaranties ... But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire* ... 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and *morality*. ..." (Emphasis ours.)

The Supreme Court continued:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

The Court then set out the *Roth* test above set forth.

When then, did the other two tests, *i.e.*, (a) the material must be "patently offensive" and (b) it must be "utterly without redeeming social value" purportedly come into the law?

Apparently, the "patently offensive test" came from the opinion of Mr. Justice Harlan in his opinion in *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482, 82 S.Ct. 1432, 1434, 8 L.Ed.2d 639 (1962). This "test," however, only received the concurrence of Mr. Justice Stewart in this case. Mr. Justice Brennan wrote an opinion concurring in the judgment for different reasons and Mr. Chief Justice Warren and Mr. Justice Douglas concurred in the opinion of Mr. Justice Brennan. Mr. Justice Black concurred in the result without opinion; Mr. Justice Clark dissented and filed a dissenting opinion. Frankfurter and White, JJ., took no part in the decision. A review of subsequent cases does not indicate to me that a majority of the Supreme Court has committed itself in any one case to the "patently offensive test." Hence, the doctrine of *stare decisis* does not commit the Supreme Court to the "patently offensive test."

The "*utterly* without redeeming social value test" (emphasis supplied) as applied to media pictures apparently came from the opinion of Mr. Justice Brennan in *Jacobellis* v. *Ohio*, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) involving the French motion picture "Les Amants" ("The Lovers"). Here again, only Mr. Justice Goldberg concurred in the opinion by Messrs. Justice Brennan, Black, Douglas and Stewart, JJ., concurring in the judgment only. Mr. Justice Harlan dissented as did Mr. Justice Warren

and Justice Clark, so that this "test" did not receive the approval of a majority of the Supreme Court.

Some have thought that the third "test" was finally brought into the law by the decision in *Memoirs*, *supra*, in 1966. But, alas, again the "test" did not receive the approval of a majority of the Supreme Court, the opinion of Mr. Justice Brennan receiving the approval of only Mr. Chief Justice Warren and Mr. Justice Fortas. Mr. Justice Clark, indeed, in his dissenting opinion in *Memoirs* observed that the social value test was "novel" and that *only three* members of the Supreme Court held to it. He further pointed out that, in his opinion, such a test *rejects* the *Roth* test to which, as above indicated, a *majority* of the Supreme Court *did agree*.

Even in the case of *Redrup* v. *New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed.2d 515 (1967) discussed at some length by us in the recent *Hewitt* case, *supra*, the *per curiam* opinion of the Supreme Court was careful to state that the necessity of meeting the three point test was one held *only* by certain justices in *Memoirs*, and did not cite the three point test as the test of the Supreme Court.

Where does this extraordinary situation leave the lower Federal Courts and State Courts in their required effort to apply the *decisions* of the Supreme Court of the United States in obscenity cases? Like the policeman in Gilbert and Sullivan's "H.M.S. Pinafore," their "lot is not a happy one." I have concluded that this Court is not *required* to follow the "three point test" in motion picture cases so far as any *authoritative and binding holding* of the Supreme Court of the United States is concerned, but that we are required to apply and follow the original *Roth* test. This conclusion is indirectly of some importance in the present case because of the statement in the concurring opinion of Circuit Judge Friendly in the Second Circuit case:

> "If the governing rule were still what Mr. Justice Brennan stated in *Roth* v. *United States*, 354 U.S. 476,

489, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), namely 'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,' I might well join Chief Judge Lumbard for affirmance." (404 F.2d at 200)

As I have concluded that the governing rule is indeed the *Roth* test, this would mean that the very excellent opinion of Chief Judge Lumbard *really* should be the opinion of the Second Circuit in that case. I might add parenthetically that, in my opinion, it should have been the majority opinion even on the other theory.[1]

I reiterate, however, that I think this Court was wise in both the recent *Hewitt* case, *supra*, and in the majority opinion to apply the "three point test" in view of the unsettled state of the decisions of the Supreme Court in the obscenity field. If a majority of the Supreme Court finally adheres to the three point test (unfortunately from my viewpoint), we will have applied the correct rule; if a majority finally adheres to the *Roth* test, the appellants cannot complain if we have applied a stricter test than the law, as ultimately determined, required us to do.

I might add that, as we observed in the *Hewitt* case, *supra* (254 Md. at 195, 254 A.2d at 211), Mr. Justice Marshall in the recent case of *Stanley* v. *Georgia*, 394 U.S. 557, 568, 89 S.Ct. 1243, 1249-50, 22 L.Ed.2d 542, 554 (decided April 7, 1969), seems to equate the cases subsequent to

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[1] I note in support of my position that the three judge court for the United States District Court for the District of Kansas, consisting of Hickey, Circuit Judge, and Stanley and Theis, District Judges, in the recent case of Grove Press, Inc. v. State of Kansas, et al and Lakeside Drive In Theatre, Inc. v. Menghini, et al, Nos. KC-2992 and KC-2997 (consolidated cases) in a per curiam opinion filed October 6, 1969, unanimously agreed with Chief Judge Lumbard's opinion.

the decision in *Roth* as continuing the *Roth* test as he stated, for the Supreme Court:

> "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

I add finally that although the "national" community standard may well be thought to apply reasonably to decisions of the Federal Courts involving the nation as a whole, and the expert testimony in the present case is sufficient to support the conclusion that the film does offend a national community standard, I have grave doubts that a majority of the Supreme Court will ultimately decide that in the exercise by the States of their "broad power to regulate obscenity," the States will be required to apply a "national" rather than a "State" standard as the "contemporary community standard." When a State seeks to clean the Augean stables of obscenity or to prevent the offending material from accumulating, it should be able to consider and apply the community standard of its own community, and not be required to attempt to evaluate the standards of other communities not under its jurisdiction. I hope indeed that a majority of the Supreme Court of the United States will ultimately reach this conclusion.

McWILLIAMS, J., dissenting

I do not agree with the majority's conclusion that the State has met its burden of satisfying the "Roth test." We have held that the triple standard announced by the Supreme Court in *Roth* v. *United States*, 354 U.S. 476 (1957), *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964) (opinion of Brennan, J.), and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.*, 383 U.S. 413 (1966) (opinion of Brennan, J.), is the standard to be applied in Maryland in determining whether certain

writings or pictures, including motion pictures, should be afforded constitutional protection or whether they are obscene and therefore ineligible for an exhibition license.' Because I think the film is not "*utterly* without redeeming social value," I would (reluctantly and with regret) reverse the court below.

Mr. Justice Brennan, in his opinion in *Jacobellis, supra*, said the *Roth* decision recognized

> "* * * that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance,' and that 'the portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.' *Id.* at 484, 487." *Id.* at 191.

[1] I am not impressed with the argument of my brother Barnes in his concurring opinion that "we are *required* [emphasis added] to apply and follow the original *Roth* test" inasmuch as that is the only test which has been expressly approved by a majority of the Supreme Court at any one time. *See* Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 Supr. Ct. Rev. 7. It is important to note, however, that the intent of the Supreme Court when it established the "original" *Roth* standard was to provide "safeguards adequate to withstand the charge of constitutional infirmity." *Roth* v. *United States*, 354 U.S. 476, 489 (1957). Mr. Justice Brennan, writing for a majority of the Court in *Mishkin* v. *New York*, 383 U.S. 502 (1966), pointed out that "[s]tates are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the *Roth* definition." * * *" *Id.* at 507. There is also little doubt that the "three-point" test favored by this Court, a plurality of justices of the Supreme Court, and by a substantial majority of the several states, *see* 5 A.L.R. 3d 1158 (1966) and Later Case Service, is sufficiently adequate "to withstand the charge of constitutional infirmity." We might also note that although, as Judge Barnes indicates, a majority of the Supreme Court has not agreed on any one standard since *Roth*, it clearly appears that the standard set forth in that case would not receive the approval of a majority of that Court today. *See Redrup* v. *New York*, 386 U.S. 767, 770-71 (1967) (per curiam).

As a result, he said

> "* * * that material dealing with sex in a manner that advocates ideas, *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a 'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." *Id.*

We cited the opinion of Mr. Justice Brennan with approval in *Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors*, 240 Md. 98, 105 (1965).

In *Memoirs* (i.e., *Fanny Hill*), *supra*, Mr. Justice Brennan wrote that courts could not disregard the word "utterly" when applying the third element of the standard which we follow. We complied with Mr. Justice Brennan's caveat in *Hewitt* v. *Maryland State Board of Censors*, 243 Md. 574 (1966), where we decided that the film "This Picture Is Censored" was not obscene and we referred to his conclusion that the Massachusetts court had "misinterpreted the social value criterion." We quoted the following passage of the Massachusetts court's opinion to illustrate its application of the social value criterion:

> "'It remains to consider whether the book can be said to be "utterly without social importance." We are mindful that there was *expert testimony, much of which was strained*, to the effect that Memoirs is a structural novel with literary merit; that the book displays a skill in characterization and a gift for comedy; that it plays a part in the history of the development of the English novel; and that it contains a moral, namely, that sex with love is superior to sex in a brothel. But the fact that the testimony

> may indicate this book has some minimal literary value does not mean it is of any social importance. We do not interpret the "social importance" test as requiring that a book which appeals to prurient interest and is patently offensive must be unqualifiedly worthless before it can be deemed obscene.' (Emphasis supplied.)" *Id.* at 595.

We also noted Mr. Justice Brennan's interpretation of the criterion:

> "Hence, even of the view of the court below that *Memoirs* [Fanny Hill] possessed *only a modicum of social value*, its judgment must be reversed . . . ." *Id.* (Emphasis added.)

We concluded our opinion by stating that

> "* * * we have no difficulty whatever concluding that if *Memoirs* has 'redeeming social value,' then, *a minori*, so does the film in this case, however, cheap, dull and tawdry it may be * * *. The testimony of the 'experts' produced by the Board support, not the finding of the trial judge, but a finding that the film is 'not *utterly* without redeeming social value.' (Emphasis supplied.)" *Id.* at 596.

As I see it, based on my reading of *Roth*, *Jacobellis* and *Fanny Hill*, and our own decision in *Hewitt*, a motion picture[2] will be constitutionally protected if there is a mere

[2] In its opinion the majority indicated that "* * * we cannot ignore the visual impact of a motion picture as contrasted with the printed word." Judge Barnes in his concurring opinion seems to suggest that different standards apply to the determination of obscenity in books as opposed to motion pictures. This state, of course, has always recognized that there are differences between the two medias and it has subjected motion pictures to a censorship scheme of prior restraint. The written word is not subject to such restraint although its possession may be a criminal offense if it is obscene. Code, Art. 27, §§ 417-18 (1967 Repl. Vol.). The

presence of matters of social importance even though the matter may in fact, be outweighed by the film's prurient appeal. *See Zeitlin* v. *Arnebergh*, 59 Cal. 2d 901, 920, 383 P. 2d 152, 165, 31 Cal. Rptr. 800, 813 (1963).

Applying the above observations to this film I question that it is obscene in the technical sense. The majority found it unnecessary to detail the opinions of the many expert witnesses who testified but it seems to me that some comment should be made. The defense offered an impressive array of witnesses. Some who testified are considered to be the foremost authorities in this state on the motion picture, and of these a few have testified for the State in previous censorship cases. Dr. Richard A. Macksey, Acting Director of the Humanities Center of the Johns Hopkins University, stated that he has taught more than a dozen different courses about films and film making and that he is a member of the Board of the Maryland Film Festival. He said the film is "concerned clearly with * * * conflicts between generations," "the doctrine of non-violence as this relates to Sweden's particular role in Europe" and with "the kind of malaise of the so-called

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Supreme Court has approved the prior restraint of motion pictures so long as the censorship scheme has procedural safeguards. *Freedman* v. *Maryland*, 380 U.S. 51, 60-61 (1965). However, the Supreme Court has never held that the standard applied to books as opposed to films should not be the same. As Judge Friendly put it:

> "* * * I find nothing in the Supreme Court's opinions that would justify a lower court in embarking on such a doctrinal innovation, which might import further confusion into a subject already sufficiently confounded. *Jacobellis* related to a film and neither the majority nor the dissenting opinions suggested that any stricter standard would apply. The 5-to-4 *per curiam* affirmance in *Landau* v. *Fording*, 388 U.S. 456, 87 S. Ct. 2109, 18 L. Ed. 2d 1317 (1967), affords too frail a foundation to support a construction of this sort." *United States* v. *A Motion Picture Entitled "I Am Curious—Yellow,"* 404 F. 2d 196, 201 (2nd Cir. 1968) (concurring opinion).

welfare state in Sweden, the ostensibly classless society." The film, he continued, covered "a wide range of social attitudes" and had "artistic merit."

Dr. Lincoln F. Johnson, Chairman of the Fine Arts Department of Goucher College, has studied motion pictures seriously for 18 years and he regularly teaches courses in the history of motion pictures and film productions. He has served also on the selection body for the American Film Festival and he views "between 100 and 150" commercial films a year. He testified that the film has "cultural significance" and "cinematic merit."

Dr. Peter H. Rossi, a sociologist, is Chairman of the Department of Social Relations of the Johns Hopkins University. He has held editorial positions on three sociological journals and he has been a consultant to the Commission on Pornography and other national commissions as well. He testified that the film has "social significance" inasmuch as it is descriptive of the criticism by young people throughout the world of the present form of society. As Dr. Rossi put it:

> "Part of this addresses itself to criticism of the political structure that exists throughout the world, and we can see them in the film. The woman, Lena, not only criticizes the Swedish present government, but is critical of the Chinese, the Russians and the like. It is not a very articulated message. It is a film which says there is something wrong and it is a film which says also that young people like the heroine are searching for a new type of personal freedom, which will pull together in a rather honest way both the political life of the nations they live in and their personal lives."

Dr. Irving M. Brown, Director of the Fine Arts Program at the University of Maryland (Baltimore campus), has made a serious study of the theater arts. He testified that the film has "artistic merit" inasmuch as it made

"a good try at some interesting forms, using a number of different frameworks and a number of themes; trying to do a number of things at the same time."

Dr. Ronald H. Paulson is Professor of English and Chairman of the English Department of the Johns Hopkins University. Dr. Paulson stated that he views, on the average, two films a week and that he has published works on literary criticism. He further testified that "* * * this is a film with * * * artistic esthetic merit. It holds together; it is relatively coherent, judged by the very best movies; it is dealing with an important subject, * * * [the] breakdown in the relationship between the symbols of authority and the people, between parents and children." Moreover, he stated that the film has social merit "in the sense that it is dealing with important social problems."

Jaromir Stephany is Chairman of the Department of Photography and Films at the Maryland Institute and he teaches courses in film making and film history. Additionally, he has been Chairman of the Maryland Film Festival and he has appeared in court on three occasions to testify for the Board of Censors. He testified that the film has artistic merit and he offered the further comment that "[i]t is rather strongly put together" and "is certainly one of the outstanding films made within the last year."

The testimony of the State's witnesses was less impressive. Reuben Kramer testified that the movie was "totally inartistic" inasmuch as the sex scenes "contaminated the picture." He conceded that he does not regularly attend the movies and has no expertise in the "cinematographic art medium." Furthermore, he stated that in his opinion very few films have any artistic merit and "are just stupid." However, he indicated that this film "is not stupid."

William Forshaw, Senior Subjects Specialist in the Humanities Department at the Pratt Library testified

that he is "interested in the preservation of American film" and is a film consultant and historian to the Baltimore Museum of Art. He stated that in his opinion, which he described as a minority one among his colleagues, the film had no social or literary merit.

Dr. Paul Yaffe is employed by the Baltimore City Schools as Director of the Educational Testing Service. He is also a part-time practicing psychologist, with "more than average ability in the area of projective techniques." He emphasized that he did "not pose as an expert of films, either from experience or study." Dr. Yaffe testified that in his opinion the film "pretended" to have socially redeeming value. He pointed out that "the socially meaningful situation is * * * shallow and if the film were to stand on it alone it could have no real redeeming features in the sense that if would be instructional or would clarify situations, and the like."

It is interesting to note that Judge Carter in the court below stated that he was "* * * impressed by the testimony of one witness, at least as * * * [he] interpreted it, who testified that * * * this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes."

The reviews produced by the appellant were written by prominent movie critics and they were equally impressive. Hollis Alpert, whose reviews have been noted by this Court in previous decisions, *see Trans-Lux Distributing Corp.* v. *Maryland State Board of Censors, supra*, wrote in the Saturday Review that the purpose of the film's director was "* * * to explore and say something, through cinematic methods, about the political and social climate of his country, Sweden." To the same effect are the reviews of Richard Schickel in Life, Vincent Canby in the New York Times, John Simon in the New York Times, Richard Atcheson in Holiday, Gregory McDonald in the Boston Evening Globe, Bernard L. Drew in The Hartford

Times, Ernest Schier in the Philadelphia Bulletin and the reviewer of the National Observer. The film was reviewed unfavorably by James J. Kilpatrick in the Los Angeles Times and Rex Reed in the New York Times.

The Attorney General does not deny that the credentials of the appellant's witnesses are impressive, but he argues that "this does not free the opinions they expressed from critical analysis." I must agree, I am bound to say, however, that they reflect at least "a modicum of social value." *Memoirs, supra; Hewitt, supra.* I cannot agree with the majority, however, that the film's social and sexual themes were not intertwined. As Judge Hays put it:

> "It is even more clear that 'I Am Curious' is not utterly without redeeming social value. Whatever weight we may attach to the opinions of the 'experts' who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that 'I Am Curious' does present ideas and does strive to present these ideas artistically. It falls within the ambit of intellectual efforts that the first amendment was designed to protect." *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"* 404 F. 2d 196, 199-200 (2nd Cir. 1968).

Judge Friendly, in his concurring opinion, said he did not feel that the sexual episodes "* * * were simply lugged in and bore no relationship whatever to the theme." Moreover, he could not "* * * conscientiously say that a connection between the serious purpose and the sexual episodes and displays of nudity is wholly wanting." *Id.* at 201.

Finally, I must take issue with Judge Barnes' suggestion that *Ginzburg v. United States*, 383 U.S. 463 (1966) is dispositive of this case. I should point out that *Ginzburg* did not involve a censorship scheme of prior restraint

nor did it involve a motion picture.[3] It is difficult to see how evidence of the type of "pandering" found by the Supreme Court in *Ginzburg* will ever be present where, as here, the film can neither be shown nor would it be advertised until it is approved and licensed by the Board of Censors. *See United States v. 4100 Copies of Magazines*, 276 F. Supp. 902 (D. Md. 1967). To be sure we did find evidence of pandering in our recent decision in *Hewitt v. Maryland State Board of Censors*, 254 Md. 179 (1969). The evidence in that case revealed that the theaters at which the film—"Odd Tastes"—was to be shown specialized in the exhibition of "sex ploitation films." It was evident also that the film's title was highly suggestive per se. Evidence of this sort is not present in the case at bar. The film was scheduled to be exhibited in Baltimore at the 7 East Theatre. The type of film normally exhibited at this theater (and its sister theater—5 West) is described in the following exchange between the appellant's attorney and Dr. Johnson:

> "Q. (Mr. Weiner) How does this film, 'I Am Curious (Yellow)', fit in with the other films which are shown at those theatres? A. Well, first of all, it is a foreign film. Secondly, it is a film, in my mind of exceptional merit, and thirdly, films shown in these two theatres seriously consider serious problems. These two theatres show films which are not simply entertainment films. They are films which are important artistically, which have some cultural significance, which raise questions of importance, and I am sure influence public opinion.

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[3] *Ginzburg*, of course, involved the pandering of a book and a magazine. The Supreme Court has not, to date, held that the *Ginzburg* doctrine is applicable to motion pictures. It is also apparent that the Court will limit *Ginzburg* to its facts. *See Redrup v. New York*, *supra*, and *Books, Inc. v. United States*, 388 U.S. 449 (1967) (per curiam), *noted in* 19 Case W. Res. L. Rev. 748 (1968).

"Q. And in your opinion, does the film 'I am Curious (Yellow)' do these things that you have just described A. Oh, yes, indeed."

Furthermore, it is not claimed nor does it appear that the title of this film, standing alone, is suggestive of its content. *Compare* the evidence of pandering found by Chief Judge Murphy in *Lancaster* v. *State*, 256 A. 2d 716 (Md. App. 1969).

I have no doubt that the notoriety this film has acquired has been more the result of the abundant publicity generated by the confiscatory action of the United States Customs Service, the ensuing decisions of the federal courts and the film's financial success than any one advertisement or book.[1] I expect the film's reputation will not suffer as a result of the action of my brothers of the majority.

It must not be supposed, however, that I have any enthusiasm for this film. I did not enjoy seeing it. I thought it was a crashing bore. Nevertheless it is not for us "to determine the quality of a * * * [film]. Our duty is to respect and enforce in full measure the freedom of expression guaranteed by state and federal constitutions." *McCauley* v. *Tropic of Cancer*, 20 Wis. 2d 134, 151, 121 N.W. 2d 545, 554, 5 A.L.R. 3d 1140, 1152 (1963).

Chief Judge Hammond and Judge Singley have authorized me to state that they concur in the views expressed in the foregoing opinion.

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[1] According to the appellant, "[t]he film was distributed nationally and it first opened in New York City on March 10, 1969. As of July 1, 1969 * * * it has been exhibited to more than 870,000 people in the cities of New York, Philadelphia, Washington, San Francisco, Los Angeles, Houston, Atlantic City, San Antonio, Miami Beach, Seattle, Norfolk, Boston and Portland. The film is currently being shown in these places, some of which are in the jurisdictions contiguous to the State of Maryland, and contracts have also been executed with exhibitors for showing in 27 additional cities."

APPENDIX B

The judgment of the Court of Appeals of Maryland entered on October 22, 1969, is included in the certified record of the case filed with the Clerk of this Court.

APPENDIX C

Memorandum Opinion and Order

(Filed July 31, 1969)

On July 11, 1969, the Maryland State Board of Censors (the Board) filed a petition pursuant to Section 19 of Article 66A of the Annotated Code of Maryland (1967 Replacement Volume) for judicial determination as to whether a certain motion picture titled "I Am Curious (Yellow)" is entitled to be exhibited within the State of Maryland considering the provisions of Section 6 of Article 66A of the said Code. This film was submitted to the Board for examination and licensing on July 1, 1969, by the applicant, Howard Wagonheim, and Grove Press, Inc., manufacturer. The Board viewed said film and on July 8, 1969, disapproved it under the provisions of Section 6 of Article 66A of the Code; said Order of disapproval being as follows:

> "After reviewing the entire film, and considering it as a whole, the Board finds that the film goes substantially beyond customary limits of candor in description and representation of sex, that it deals purposely and effectively with sex in a manner which appeals to the prurient interest that it is without social importance, and that it lacks any identifiable artistic, cultural, thematic or other value which might be considered redemptive."

Arrangements were made for a viewing thereof and the film was viewed by the Court.

An answer was filed by the defendant asserting, *inter alia*, (1) that the film when released for viewing by the public will not be exhibited to any person under eighteen years of age; (2) that the film has already been declared to be not obscene by a final judgment of the United States Court of Appeals for the Second Circuit *in rem* action brought by the United States of America pursuant to 19 U.S.C.A., Section 1305, and that further judicial review of

the film by a State court prior to showing of the film is precluded; and (3) that Article 66A, Section 6 of the Maryland Code is unconstitutional and void, being in conflict with the free speech clause of the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The real issue as to this film is whether it is obscene in the constitutional sense in that the three elements upon which obscenity is tested coalesce. The burden of proof must be met by the Board.

In presenting its case, the Board first established that the film had been disapproved and the Order of Disapproval was introduced as an exhibit. Thereafter, a number of witnesses were presented, all of whom I felt were qualified to testify as experts in their particular fields. These witnesses' testimony supported the Board's position that the film is obscene tested by the standards laid down by the Supreme Court of the United States and by the Court of Appeals of Maryland. The legal requirements for proof of obscenity are set forth in two principal cases: In Maryland, *Sanza* v. *Maryland Board of Censors*, 245 Md. 318 (1967), and in the Supreme Court of the United States, the case of *Roth* v. *U. S.*, 354 U.S. 476. These cases hold that material is not to be labeled as obscene unless proved by competent evidence (including testimony by an expert witness or witnesses) and (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly without redeeming social value.

The defense presented numerous witnesses of exceptional talent and educational background. As I recall it, only one of them had less than a PhD degree. They had

credit for innumerable articles and books and other materials in connection with their chosen fields. They were all persons of high standing in positions in universities and other educational activities in Baltimore City. They were certainly adequate to testify as to the opinion and thinking of persons of such high intellectual standards, but I am not certain that they were aware of the attitude of the average person with respect to the problems involved in this case, yet in certain respects, concerning which I shall comment later, and which in my opinion is pertinent, practically all seemed to agree.

In view of the fact that I have but a limited period of time in which to file this opinion, it is impossible to set out all the background qualifications of these witnesses and no doubt on appeal this will be done so that the Court of Appeals will have the advantage of the full record as to all witnesses, including those for the State and those for the Defendant.

Since the film must be viewed at each judicial level, a complete factual analysis of the film is not essential.

After having viewed the film and having listened to the testimony of the witnesses for approximately two weeks, it is my considered judgment, thought by many I am sure to be conservative, that the film, "I Am Curious (Yellow)" meets the tests of obscenity previously laid down by the Courts and that the Order of the Maryland State Board of Picture Censors should be affirmed.

This film was produced in Sweden and the dialogue is in Swedish; English subtitles have been added. In an action brought in the United States District Court for the Southern District of New York, pursuant to 19 U.S.C., Section 1305, after a jury trial, it was ordered forfeited and confiscated. An appeal from that decision resulted in a reversal by a two to one decision. On the ground that under standards established by the Supreme Court, a showing of the picture could not be prohibited; it was also deter-

mined in said appeal that the question of obscenity being a constitutional question, the District Court should not have submitted that question to a jury. An examination of the opinion of Judge Thomas F. Murphy of the District Court on a motion for summary judgment and of the opinions of the three appellate judges is interesting. Among the comments of Judge Murphy in his opinion, we find the following:

> "The film was exhibited to me on April 10, 1968. To me it was repulsive and revolting, the sexual scenes having no relationship to the story line or plot — if there was one. These sexual scenes ranged from copulating in a tree; copulating astride a balustrade of a public building and in the nude in a room; with other scenes of buggery, cunnilinction (sic) and fellatio, all in the nude. The final scene, in conformity to the dominant theme, shows the female lead performing an orchiectomy or peotomy or both on her murdered lover with a kitchen carving knife.
>
> "If the film has a message, whether it is public poll taking on the social structure of the Swedish society or the advocacy of non-violence or anti-Francoism, I would suspect it is merely dross, providing a vehicle for portraying sexual deviation and hard core pornography. In my opinion, the average person applying community standards would find that the dominant theme, taken as a whole, appeals to prurient interest, is insulting to the American public and is devoid of social value."

Circuit Judge Haynes wrote the majority opinion for the United States Court of Appeals for the Second Circuit, and some of his comments are as follows:

> "There are a number of scenes which show the young girl and her lover nude. Several scenes depict sexual intercourse under varying circumstances, some

of them quite unusual. There are scenes of oral-genital activity.

"It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts.

* * * "Nudity and sexual activity in motion pictures, it is argued, bear a close resemblance to nudity and sexual activity in a public place. Obviously conduct of this type may be forbidden."

Circuit Judge Friendly, concurring "with no little distaste," pointed out the divergence of views within the Supreme Court and the consequent multiplicity of opinions on the subject of obscenity in referring to an article by Magrath, The Obscenity Cases: Grapes of Roth, 1966 Supp. Court Rev. 7, 56-57, in which it is stated that there are "five separate and contradictory tests." In his concurring opinion, Judge Friendly seems to suggest that the States should not be preempted by the Federal Government as to hard-core pornography because he stated "Mr. Justice Harlan initiated the hard-core pornography limitation with respect to federal action although he would *allow greater leeway to the states.*" (Emphasis supplied.)

Later on in his opinion, Judge Friendly stated:

* * * I would agree that the presence of 'redeeming social value' should not save the day if the sexual episodes were simply lugged in and bore no relationship whatever to the theme; a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms. While this case may come somewhat close to the line, I cannot conscientiously say that a connection between the serious purpose and

the sexual episodes and displays of nudity is wholly wanting."

In concluding his concurring opinion, Judge Friendly said:

> "When all this has been said, I am no happier than Chief Judge Lumbard about allowing Grove Press to bring this film into the United States. But our individual happiness or unhappiness is unimportant, and that result is dictated by the Supreme Court decisions."

He concludes his opinion by admonishing the importer, distributors, and exhibitors of the film that it should not be exhibited to minors and that it should not be advertised in a manner calculated to capitalize on its "extensive portrayals of nudity and sexual activity rather than its *supposed* (emphasis supplied) serious message," and with "reservations and no little distaste" Judge Friendly concurred with Judge Hays in the reversal of the District Court.

Taking up Chief Judge Lumbard's dissenting opinion, he referred to the verdict of the jury which, after seeing the motion picture and hearing the "experts" regarding its significance, "unanimously found that its dominant theme appeals to a prurient interest in sex, that it is patently offensive because it affronts contemporary community standards, and that it is utterly without redeeming social value." Chief Judge Lumbard thought that the jury verdict should not be disturbed.

Aside from the question of whether or not the case was properly submitted to a jury Chief Judge Lumbard stated:

> "It is admitted that in its explicitness this picture goes beyond anything thus far exhibited in this country. As my brother Hays says, 'It seems to be con-

ceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing.' The sexual aspect of the film does not arise from the plot, *as that is non existent;* (emphasis supplied) it arises from a decision by the director, Vilgot Sjornan, to produce a film which would shock the audience. He testified that in making the film he deliberately broke sexual taboos or cliches knowing that this would be shocking to the public.

"Whatever one can say about the alleged significance of the film which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.

"While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these acts bear no conceivable relevance to any social value, except that of box-office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture. Obviously the only interest aroused for the average person is a prurient interest."

In concluding, Chief Judge Lumbard, in his dissenting opinion, said "I join Judge Friendly in pointing out that state and local authorities may intervene if minors are admitted to the audience or if those who promote the exhibition of the film do so in ways which capitalize on the film's 'extensive portrayals of nudity and sexual activity'."

In the presentation of the case, a number of reviews and other articles were introduced, both pro and con. An excellent article appeared in the Wall Street Journal under date of March 14, 1969, by Alan Adelson. He seems to summarize the problem in one paragraph reading as follows:

> "Some viewers may be pleased, others perplexed or angered, but the showing of 'I Am Curious-Yellow' seems to qualify as a significant event. Those who tilt against all forms of censorship see it as marking the emergence of the U.S. as a leader in free speech and expression. To quite another group, the film is the final confirmation of a disaster they have long seen brewing. The growing permissiveness of American society, they maintain, has finally reached total depravity."

Perhaps there may be a middle and reasonable ground with regard to this problem yet to be discovered. Vocal minority in any given situation will frequently prevail unless the forces of the opposition become aware of what is going on. There is a point of view today that there should be a curtailment of the forces of pornography and similar associations on and off the screen, television, radio, etc.; and it would appear that the time has come to halt or at least more clearly define their program. This does not mean a return to puritanism by any stretch of the imagination; but it does mean a return to sense and decency.

In this case I was impressed by the testimony of one witness, at least as I interpreted it, who testified that, in his opinion, this is a serious film, strongly put together, confusing to some, but that it would not hold together without the sex scenes.

Almost without exception, all the witnesses testified that this film should not be shown to a minor; and they,

generally speaking, fixed the age of a minor as one under eighteen years of age. Of course, there are those who would argue that this perhaps is the age where a film of this character would do the most harm. We have not adopted in Maryland the idea, advocated by many, of classification; nor do I believe that under existing law, our courts have the right to permit a showing of any film with age restrictions. While I think these questions are part of the case and actually could be determinative of the issue, my conclusion is not on that basis.

In my opinion, and I so find, this film "I Am Curious (Yellow)" is obscene in that in fact (1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters whether these standards be taken on a local or national basis; and (3) that the material is utterly without redeeming social value.

In arriving at my determination of this case, I first heard opening statements, after which I viewed the film. Thereafter, over a period of approximately two weeks, extensive testimony was taken, at the conclusion of which I thought it advisable, in the light of said testimony, to again view the film. At the conclusion of the second viewing, I was thoroughly convinced that the Board's action in this case was proper and should be affirmed and that the testimony of the expert witnesses offered by the exhibitor and producer and their explanations of the reasons for the various objectionable scenes must be rejected.

For the reasons set forth above, it is this 31st day of July, 1969, ORDERED, ADJUDGED AND DECREED by the CIRCUIT COURT OF BALTIMORE CITY that the film "I Am Curious (Yellow)" be disapproved for licensing as in violation of Article 66A, Section 6, as heretofore found by the petitioner.

JOSEPH L. CARTER,
Judge.

APPENDIX D

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

A MOTION PICTURE FILM ENTITLED "I AM CURIOUS-YELLOW" ("JAG ÄR NYFIKEN-GUL") (35 mm., Black and White 6 Double Reels, 11,746 ft., Swedish soundtrack with English subtitles), Grove Press, Inc.,
Claimant-Appellant.

No. 569, Docket 32448.

United States Court of Appeals
Second Circuit.

Argued July 22, 1968.

Decided Nov. 26, 1968.

Edward de Grazia, New York City (Richard T. Gallen, New York City, on the brief), for appellant.

Lawrence W. Schilling, Asst. U.S. Atty. (Robert M. Morgenthau, U.S. Atty. for the Southern District of New York and David Paget, Asst. U.S. Atty., on the brief), for appellee.

Before LUMBARD, Chief Judge, and FRIENDLY and HAYS, Circuit Judges.

HAYS, Circuit Judge:

This is an appeal from a judgment of the district court, after a jury trial, ordering the forfeiture and confiscation under Section 305 of the Tariff Act of 1930, 19 U.S.C. § 1305 (1964)[1] of the motion picture entitled "I Am Curious-

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[1] § 1305. Immoral Articles; Prohibition of Importation

(a) All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any

Yellow." We reverse the judgment on the ground that under standards established by the Supreme Court the showing of the picture cannot be inhibited.

obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: *Provided*, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subdivision: *Provided further*, That the Secretary of the Treasury may in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

"I Am Curious-Yellow" was produced in Sweden and the dialogue is in Swedish; English subtitles have been added. As with many other contemporary artistic productions there can be a difference of opinion as to what the picture is "about."[2] It would perhaps not be demonstrably wrong to say that it is concerned with that subject which has become such a commonplace in contemporary fiction and drama, the search for identity. It is the story of a young girl who is trying to work out her relationship to such political, social, and economic problems as the possibility of a classless society, the acceptance of the Franco regime, and the policy and practice of nonviolence. At one point the girl experiments with oriental religious ritual and meditation. The girl's inter-personal relationships are also pictured, including particularly her relation to her father, presented as an idealist who has become disillusioned and has given up meaningful activity. A fairly large portion of the film is devoted to the relations between the girl and her young lover.

A number of different techniques are employed in the production of the film. For example much of the early part is in terms of "cinema verité," showing the girl asking questions on subjects of public importance of the ordinary man or woman in the street. The problem of the nature

[2] Thirteen "experts" (professional critics, English professors, a minister, sociology professors, a "professor of film," psychiatrists, a novelist) gave testimony as to their views of the social value of the film. Some of their answers to questions as to the dominant theme of the film were: change, transition; the nature of reality or of "modern" reality; the New Left; the interrelationship of various aspects of human activity; the quest for values; the beliefs and commitments of the young; the younger generation; the generation gap; the relationship between fantasy and reality; young people's search for identity and self-recognition; political, social and sexual maturity; political responsibility; the use of ritual to establish fundamental truth; the nature of politics; the complexity of modern reality.

of reality is suggested by passages representing the girl's fantasies and by the injection into the story of material concerning the making of the picture itself, such as the director's relations with the leading actress.

There are a number of scenes which show the young girl and her lover nude. Several scenes depict sexual intercourse under varying circumstances, some of them quite unusual. There are scenes of oral genital activity.

It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing. The question for decision is whether, going farther in this direction than any previous production, the film exceeds the limits established by the courts.

The government argues with considerable cogency that the standards by which motion pictures are to be judged may be different from those that are used in the case of books. It points out that a motion picture reproduces actual conduct so that it can be seen and heard. Books are read by individuals in private, whereas motion pictures are viewed in public. Nudity and sexual activity in motion pictures, it is argued, bear a close resemblance to nudity and sexual activity in a public place. Obviously conduct of this type may be forbidden.

[1] No doubt the standards by which motion pictures are to be judged differ in some particulars from those to be applied to books, see Freedman v. Maryland, 380 U.S. 51, 60-61, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952); United States v. One Carton Positive Motion Picture Film Entitled "491," 367 F.2d 889, 907 (2d Cir. 1966) (Lumbard, Ch. J., dissenting); but see Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). Nevertheless the comparison urged by the government between nudity and sexual activity in a public place and the same matters as portrayed in a motion

picture such as "I Am Curious" is far fetched. In the motion picture the material is a part of an artistic whole and is united with and related to the story and the characters which are presented. This is vastly different from a sudden unrelated episode taking place in public. The exhibition in a motion picture of an isolated instance of sexual intercourse or of irrelevant nudity, which would indeed be equivalent to public display, could be halted under the established standards, just as could similar material if it appeared in print.

[2, 3] Whatever differences there may be in the application of obscenity standards, a motion picture, like a book, is clearly entitled to the protection of the first amendment. Joseph Burstyn, Inc. v. Wilson, supra; Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 (1968). And the test of whether a motion picture is to be condemned is the three-fold test stated in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Atty. Gen. of Com. of Massachusetts, 383 U.S. 413, 418, 86 S.Ct. 975, 977, 16 L.Ed.2d 1 (1966):

> "[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

[4] The issue of the obscenity of "I Am Curious" was submitted to the jury under this three-fold test and the jury found the picture obscene. However, in our view obscenity *vel non* is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the court. As Mr. Justice Harlan said in Roth v. United States, 354 U.S. 476, 497-98, 77 S.Ct.

1304, 1316, 1 L.Ed.2d 1498 (1957) (concurring and dissenting):

> "[I]f 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. Many juries might find that Joyce's 'Ulysses' or Boccaccio's 'Decameron' was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are 'utterly without redeeming social importance.'" (Emphasis in original.)

See also the remarks of Mr. Justice Brennan in Jacobellis v. Ohio, supra, 378 U.S. at 187-90, 84 S.Ct. 1676.

[5] Applying the *Memoirs* standards we find that the picture cannot be classified as obscene on at least two of the three grounds comprising the test.

Although sexual conduct is undeniably an important aspect of the picture and may be thought of as constituting one of its principal themes, it cannot be said that "the dominant theme of the material taken as a whole appeals to a prurient interest in sex." Whatever the dominant theme may be said to be (see footnote 2 supra) it is certainly not sex. Moreover, not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful that interest in it should be characterized as "prurient."

It is even more clear that "I Am Curious" is not utterly without redeeming social value. Whatever weight we may attach to the opinions of the "experts" who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is

quite certain that "I Am Curious" does present ideas and does strive to present these ideas artistically. It falls within the ambit of intellectual effort that the first amendment was designed to protect.

On the issue of whether the picture is "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," the jury's verdict may carry more weight. (But see Jacobellis v. Ohio, supra, 378 U.S. at 192-95, 84 S.Ct. at 1680; cf. United States v. Klaw, 350 F.2d 155 (2d Cir. 1965); see also Ginzburg v. United States, 383 U.S. 463, 479-80, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966) (Black, J., dissenting)). However, it is unnecessary for us to pass upon this third test, since the picture is not obscene under the other two of the Supreme Court's standards.

We hold, therefore, that the picture cannot be condemned under Section 305.

FRIENDLY, Circuit Judge (concurring):

This court's responsibility here is limited. We are not, as Chief Judge Lumbard's dissent seems to assume, writing on what is largely a clean slate, but rather on one already well covered by our superiors. Our duty as an inferior federal court is to apply, as best we can, the standards the Supreme Court has decreed with regard to obscenity. That task, to be sure, is not altogether easy in light of the divergence of views within the Court and the consequent multiplicity of opinions; a scholarly article has deduced from the spate of decisions in 1966 no less than "five separate and contradictory tests." Magrath, The Obscenity Cases: Grapes of Roth, 1966 Sup. Court Rev. 7, 56-57.[1]

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[1] The author notes that these three decisions, Memoirs v. Massachusetts, 383 U.S. 413, 86 S. Ct. 975 (1966); Ginzburg v. United States, 383 U.S. 463, 86 S. Ct. 912 (1966); and Mishkin v. New York, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966), gave rise to fourteen opinions, which spread over more than a hundred pages of the United States Reports. Id. at 7-8.

If the governing rule were still what Mr. Justice Brennan stated in Roth v. United States, 354 U.S. 476, 489, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), namely, "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest," it might well join Chief Judge Lumbard for affirmance. But, quite clearly, it is not. The modification began with the opinion of Mr. Justice Brennan, writing also for Mr. Justice Goldberg, in Jacobellis v. Ohio, 378 U.S. 184, 191-192, 84 S.Ct. 1676 (1964), and the transformation was completed in A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975 (1966). There Mr. Justice Brennan, in an opinion joined by the Chief Justice and Mr. Justice Fortas, while professing adherence to *Roth*, emerged with a much more permissive standard. Under *Memoirs* a publication cannot be condemned simply because "the dominant theme of the material taken as a whole appeals to a prurient interest in sex" and "the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." Although these criteria are met, "a book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness." 383 U.S. at 418-420, 86 S.Ct. at 978. The deliberate character of this change was highlighted in the dissents of Mr. Justice Clark, 383 U.S. at 451, 86 S.Ct. 975, and Mr. Justice White, 383 U.S. at 460-462, 86 S.Ct. 975. Judge Hays' opinion sufficiently demonstrates the existence of the required modicum of social value here.

It is true that in *Memoirs* Mr. Justice Brennan wrote only for three Justices. But it is plain that three other

members of that bench would have opted for an even more permissive standard and a fourth would have done so for federal action. Justices Black and Douglas have consistently considered all obscene matter to be "constitutionally protected, except where it can be shown to be so brigaded with illegal action that it constitutes a clear and present danger to significant social interests," Magrath, supra, 1966 Sup. Court Rev. at 56. Mr. Justice Stewart believes that the First Amendment permits the outlawing only of hard-core pornography. Jacobellis v. Ohio, supra, 378 U.S. at 197, 84 S.Ct. 1676 (concurring), and Ginzburg v. United States, 383 U.S. 463, 499-500, 86 S.Ct. 942 (1966) (dissenting). Mr. Justice Harlan initiated the hard-core pornography limitation with respect to federal action although he would allow greater leeway to the states, Roth v. United States, supra, 354 U.S. at 496, 77 S.Ct. 1304 (concurring and dissenting), and he continues to hold this view, Ginzburg v. United States, supra, 383 U.S. at 498, 86 S.Ct. 942 (dissenting).

While I do not challenge Chief Judge Lumbard's views about the offensive character of the extensive displays of nudity and sexual activity in "I Am Curious-Yellow,"[2] the latter falls short of Mr. Justice Clark's description of those which apparently comprise almost all of "Memoirs of a Woman of Pleasure," 383 U.S. at 445-446, 86 S.Ct. at 989. Not truly disputing that, the Government makes two arguments for a different result here. The first is that a stricter standard should apply to motion pictures and plays than to books. Although, for reasons indicated in the opinions of both of my brothers, there might be merit to this as an original question, I find nothing in the Supreme Court's opinions that would justify a lower court in embarking on such a doctrinal innovation, which might

[2] Some but by no means all of the latter would fit Mr. Justice Goldberg's description of "'fragmentary and fleeting.'" Jacobellis v. Ohio, supra, 378 U.S. at 197-198, 84 S. Ct. 1676.

import further confusion into a subject already sufficiently confounded. *Jacobellis* related to a film and neither the majority nor the dissenting opinions suggested that any stricter standard would apply. The 5-to-4 *per curiam* affirmance in Landau v. Fording, 388 U.S. 456, 87 S.Ct. 2109, 18 L.Ed.2d 1317 (1967), affords too frail a foundation to support a construction of this sort.[3] The other is that there is no sufficient nexus in this film between the scenes of nudity and sexual activity and the problems of the girl—one could hardly call her the heroine—in trying to work out her relationship with life. Although *Memoirs* did not in terms require such a nexus, I would agree that the presence of "redeeming social value" should not save the day if the sexual episodes were simply lugged in and bore no relationship whatever to the theme; a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms. While this case may come somewhat close to the line, I cannot conscientiously say that a connection between the serious purpose and the sexual episodes and displays of nudity is wholly wanting.

The only point requiring further discussion is Chief Judge Lumbard's elevation of the role of the jury. This has its attractiveness, if only in relieving busy appellate courts from having to spend so much time on cases like this. See O'Meara & Shaffer, Obscenity in the Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Lawyer 1 (1964). But I find little support for his thesis in the many opinions of members of the Supreme Court during the last decade. Even Chief Justice Warren's more moderate statement in dissent in Jacobellis v. Ohio, supra, 378 U.S. at 202-203, 84 S.Ct. at 1686, that he would subject the judgments of lower courts "to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made," was concurred in solely by Mr. Justice Clark. Squarely to the contrary

[3] At the argument appellant's counsel pointed to a number of factors present in Landau but not here that would have provided the basis for that decision.

are Mr. Justice Harlan's observations in dissent in Roth v. United States, supra, 354 U.S. at 497-498, 77 S.Ct. 1304, and in speaking for himself and Mr. Justice Stewart in Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962), and Mr. Justice Brennan's expressions for himself and Mr. Justice Goldberg, joined in this respect by Mr. Justice Harlan, in Jacobellis v. Ohio, supra, 378 U.S. at 189-190, 203, 84 S.Ct. 1676. Placing the decisional task upon judges is a natural consequence of the emphasis on "a national standard of decency," Manual Enterprises v. Day, supra, 370 U.S. at 488, 82 S.Ct. 1432 (Harlan, J.), and Jacobellis v. Ohio, supra, 378 U.S. at 194-195, 84 S.Ct. 1676 (Brennan, J.), a principle peculiarly applicable to a federal statute governing the exclusion of a film from the entire United States.[4] Likewise the jury has no special competence on the issue of "redeeming social value." Finally, the Director of the Imports Compliance Division of the Bureau of Customs here conceded that the film had social value; the contrary verdict cannot be supported, for reasons outlined in Judge Hays' opinion; and the issue of a sufficient nexus is peculiarly unsusceptible for jury determination and never was submitted to it.

When all this has been said, I am no happier than Chief Judge Lumbard about allowing Grove Press to bring this film into the United States. But our individual happiness or unhappiness is unimportant, and that result is dictated by Supreme Court decisions. If we could depart from the plurality opinions in favor of the hardcore pornography test advocated by Mr. Justice Stewart and, for federal

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[4] Mr. Justice Brennan's dissent in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 447, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957), quoted in the dissent here, antedated development of the "national standard" concept. While the jury is well adapted to reflect "the voice of the country-side," see 2 Pollock & Maitland, History of English Law 624 (2d ed. 1952), it would have even more difficulty than judges in determining what would be offensive nationally. See O'Meara & Shaffer, supra, at 8.

action, by Mr. Justice Harlan which, we are told, would at least have the merit of manageability, see Magrath, supra, 1966 Sup. Court Rev. at 69-77 reversal would be still more clearly dictated. What we ought to make plain, however, and not at all in a "tongue-in-cheek" fashion, is that our ruling is limited in two respects: The importer has represented that it intends to require exhibitors to exclude minors from the audience; it must realize that if this representation should be violated, the film and its distributors and exhibitors will be subject to attack under the principle of Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). The importer, distributors and exhibitors should also realize that if they advertise the film in a manner calculated to capitalize on its extensive portrayals of nudity and sexual activity rather than its supposed serious message, Ginzberg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), will be applicable.

With these reservations and with no little distaste, I concur for reversal.

LUMBARD, Chief Judge (dissenting):

I dissent and vote to affirm the judgment of the district court which held that the film "I Am Curious—Yellow" should be barred from importation into the United States. That judgment was entered upon the verdict of a jury which, after seeing the motion picture and hearing the "experts" regarding its significance, unanimously found that its dominant theme appeals to a prurient interest in sex, that it is patently offensive because it affronts contemporary community standards, and that it is utterly without redeeming social value. All are agreed that Judge Murphy's charge correctly stated the law and instructed the jury. Indeed, counsel for the appellant took no exception whatever to the charge. I see no good reason why that jury verdict should be disturbed.

My colleagues give no satisfactory explanation why jurors are not as qualified as they to pass upon such questions. The conclusion is inescapable that they really think that the issue of obscenity can be entrusted to juries only if the judges themselves (or, as here, a majority of them) think the matters in question go beyond the limits allowed by law. I had not supposed that only those who wear federal judicial robes are qualified to decide whether a motion picture has any redeeming social value.

It is admitted that in its explicitness this picture goes beyond anything thus far exhibited in this country. As my brother Hays says, "It seems to be conceded that the sexual content of the film is presented with greater explicitness than has been seen in any other film produced for general viewing." The sexual aspect of the film does not arise from the plot, as that is non-existent; it arises from a decision by the director, Vilgot Sjornan, to produce a film which would shock the audience. He testified that in making the film he deliberately broke sexual taboos or cliches knowing that this would be shocking to the public.

The excerpts from the director's diary which were published in Sweden emphasize sex and the breaking away from old cliches about sex. The diary makes no mention whatever of any of the aspects of the film which it is claimed give it redeeming social value—the class structure in Sweden, ideas of nonviolence, and the like.

Whatever one can say about the alleged significance of the film, which to this captive onlooker was a continuous and unrelieved boredom except for the sexual scenes, it is almost impossible to remember anything about it. The only impact the picture has and the only impact it was designed to have are the sexual scenes; its only interest to the viewer arises from the uncertainty of the method of mutual sexual gratification in which hero and heroine will next indulge.

While the sex is heterosexual, the participants indulge in acts of fellatio and cunnilingus. Needless to say these

acts bear no conceivable relevance to any social value, except that of box office appeal. Moreover, the sexual scenes have nothing whatever to do with the remainder of the picture. Obviously the only interest aroused for the average person is a prurient interest. Nor is it persuasive that the explicit sex scenes take only about 10 minutes out of 120. The enormous visual impact of a motion picture as distinguished from other media cannot be disregarded. Cf. Freedman v. Maryland, 380 U.S. 51, 61, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). The combination of sight and sound, in the darkness of the movie theater, result in a uniquely forceful impact on the audience. Because of the nature of this medium, sexual scenes in a motion picture may transcend the bounds of constitutional protection long before a frank description of the same scenes in a book or magazine. Cf. Landau v. Fording, 245 Cal.App.2d 820, 54 Cal.Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456, 87 S.Ct. 2109, 18 L.Ed.2d 1317 (1967). Undoubtedly, the jury was aware of the difference between movies and other media when it found this film to be obscene.

But the majority would take away from the jury the power to pass on these not too difficult and complicated questions by saying that obscenity is "an issue of constitutional law" rather than an issue of fact with respect to which the jury's finding has its usual conclusive effect. To me this simply means that juries are not to be trusted where a majority of the judges disagree with them.

The action of the majority in nullifying the findings of the jury here goes beyond any case thus far decided in the obscenity area. No case is cited and I can find no case where the Supreme Court has set aside the verdict of a jury which has, under proper instructions, found present the three elements of obscenity as established by Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957), and Jacobellis v. Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964). There is no reason to suspect that judges are in any better position to pass

judgment on these matters than are jurors. Compare Mr. Justice Brennan's remarks in Kingsley Books, Inc. v. Brown, 354 U.S. 436, 448, 77 S.Ct. 1325, 1331, 1 L.Ed.2d 1469 (dissenting opinion):

> "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards."[1]

With due deference to the very considerable intellectual attainments of my colleagues, I submit that when it comes to a question of what goes beyond the permissible in arousing prurient interest in sex, the verdict of a jury of twelve men and women is a far better and more accurate reflection of community standards and social value.[2] The

[1] See also Chief Justice Warren, dissenting in Jacobellis, 378 U.S. at 199, 84 S. Ct. at 1686:

> "[P]rotection of society's right to maintain its moral fibre and the effective administration of justice require that this Court not establish itself as an ultimate censor, in each case reading the entire record, viewing the accused material, and making an independent de novo judgment on the question of obscenity. Therefore, once a finding of obscenity has been made below under a proper application of the Roth test, I would apply a 'sufficient evidence' standard of review * * *."

[2] It is no answer that so-called "experts" testified to social value of the film. Neither juries nor appellate courts are bound by expert testimony. Compare Landau v. Fording, 245 Cal. App. 2d 280, 51 Cal.Rptr. 177 (1966), aff'd per curiam, 388 U.S. 456, 87 S. Ct. 2109, 18 L. Ed. 2d 1317 (1967), where the film Un Chant D'Amour was held to be obscene notwithstanding testimony in support of the film by seven expert witnesses.

When "expert" witnesses testify, as one did here, that a film such as I Am Curious has religious and moral significance, it is understandable that the jury pays little attention to their testimony. Cf. Transcript at 148-51.

jurors are drawn from all walks of life[3] and their less pretentious positions in the community qualify them to answer the questions put to them by Judge Murphy at least as well as circuit judges in their middle sixties who cerebrate in the ivory towers of the judiciary.[4]

It remains only to comment on Judge Friendly's tongue in cheek admonition to the exhibitors. They are cautioned that state authorities may still intervene if minors are admitted to see the picture or if the film is advertised to capitalize on nudity and sexual activity. All of which seems to me to amount to a concession that the entire public ought to be protected against the exploitation for profit of a film which a jury has outlawed for obscenity in violation of the federal statute. However, as the contrary view of my brothers has prevailed here, I join Judge Friendly in pointing out that state and local authorities may intervene if minors are admitted to the audience or if those who promote the exhibition of the film do so in ways which capitalize on the film's "extensive portrayals of nudity and sexual activity."

I would affirm the judgment of the district court which barred this film from importation.

[3] The records of the district court show that the jury in this case was made up of 7 men and 5 women who resided in New York City and its suburbs. They ranged in age from 32 to 68 years and engaged in widely varying occupations.

[4] Compare, Mr. Justice Black, dissenting in Mishkin v. New York, 383 U.S. 502, 515, 516, 86 S. Ct. 958, 968, 16 L. Ed. 2d 56 (1966):

> "But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censorship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read."

APPENDIX E

CALIFORNIA

(San Jose)—*Grove Press, Inc.* v. *Louis P. Bergna, et al*, No. 52300 (U. S. District Court Northern District of California)

COLORADO

(Denver)—*Grove Press, Inc.* v. *The State of Colorado, et al*, No. C-1677 (U. S. District Court for the District of Colorado)

(Denver)—*People of the State of Colorado, et al* v. *Sher Enterprises, Inc., et al*, No. C-12226 (District Court in and for the City and County of Denver State of Colorado)

GEORGIA

(Atlanta)—*Grove Press, Inc.* v. *Lewis R. Slaton, et al*, No. 13040 (U. S. District Court Northern District of Georgia Atlanta Division)

KANSAS

(Kansas City)—*Grove Press* v. *State of Kansas*, No. KC 2992 & KC 2997 (U. S. District Court for the District of Kansas)

(Kansas City)—*State of Kansas* v. *Motion Picture Entitled "I AM CURIOUS-YELLOW"*, *et al*, Nos. 6122 Div. No. 1 (District Court of Johnson County, Kansas.)

MARYLAND

(Baltimore)—*Howard Wagonheim, et al* v. *Maryland State Board of Censors*, No. 212 (Court of Appeals of Maryland)

MASSACHUSETTS

(Boston)—*Commonwealth of Mass.* v. *Serafim Karalexis, et al*, Nos. 43068-69-70-71 (Suffolk Superior Court)

(Boston)—*Serafim Karalexis* v. *Garrett H. Byrne*, Civil Action No. 69-665-J (U. S. District Court for the District of Massachusetts)

MICHIGAN

(Detroit)—Grove Press, Inc. v. Robert B. Blackwell, et al, No. 33369 (U. S. District Court Eastern District of Michigan Southern Div.)

MISSOURI

(Kansas City)—Herbert C. Hoffman v. Dickinson Operating Co., et al, No. 730169 Div. No. 7 (Circuit Court Jackson County, Mo.)

NEW JERSEY

(Livingston)—Joseph P. Lordi, Prosecutor v. United Artists Corp., et al, No. C-787-69 (Superior Court, Chancery Div. Essex County)

(Linden)—Leo Kaplowitz, Prosecutor v. Wood Plaza Theatres Corp., et al, No. C-829-69 (Superior Court, Chancery Div. Union County)

(Woodbridge)—Edward J. Dolan, Prosecutor v. United Artists Corp., et al, No. C-813-69 (Superior Court, Chancery Div., Middlesex County)

NEW MEXICO

(Albuquerque)—Grove Press, Inc., et al v. City of Albuquerque, et al, No. 8177 (U. S. District Court for the District of New Mexico)

(Albuquerque)—City of Albuquerque v. Tom Singleton, No. P412-9117675 (Municipal Court City of Albuquerque)

OHIO

(Cleveland)—Grove Press, Inc., et al v. John T. Corrigan, et al, No. 877845 Civil Branch

(Cleveland)—State of Ohio v. Dave Browdie, No. 93748 Criminal Branch

PENNSYLVANIA

(Philadelphia)—Grove Press, Inc. v. *City of Philadelphia*, No. 69-972, *City of Philadelphia* v. *19th and Chestnut Street Corp, et al*, No. 69-934, (U. S. District Court for the Eastern District of Pennsylvania)

(Philadelphia)—City of Philadelphia v. *19th and Chestnut Street Corp., et al*, and *Grove Press*, Nos. 17,955 and 17,956 (U. S. Court of Appeals)

VIRGINIA

(Norfolk and *Virginia Beach)—Grove Press, Inc., et al* v. *Andre Evans, et al*, No. 355-69-N (U. S. District Court for the Eastern District of Virginia, Norfolk Div.)

Commonwealth of Virginia v. *Kenneth Andrews*, (Municipal Court of City of Norfolk)

WASHINGTON

(Spokane)—State of Washington v. *National General Theatres, Inc.*, No. 194766 (Superior Court of the State of Washington in and for the County of Spokane)

(Spokane)—Grove Press, Inc., et al v. *Donald C. Brockett, et al*, No. , (U. S. District Court Eastern District of Washington, Northern Div.)

APPENDIX F

The Film:

The film was produced by a Swedish studio, Sandrew, and it was directed by Vilgot Sjoman, a protege of Ingmar Bergman. It presents a kaleidoscopic portrait of Sweden, portraying problems and tendencies in the contemporary social and political scene. There are two story lines which develop little by little and merge in the running of the film.

A middle-aged director (played by the film's actual director) and a young drama student (played by the film's main actress) are seen working on the film, "I Am Curious — Yellow and Blue," together. In the making of the film which became the "Yellow" version, the student grows interested in her young co-actor, and by the film's final sequence, leaves the director to go off with the actor. The actress who plays the drama student in the film being made also plays a young girl who lives with her father in a picture frame shop. The girl is disillusioned with her father who in his idealistic youth went to fight in the Civil War in Spain, but grew frightened and fled. She tries to carry out, in her own way, what her father failed to achieve, and much of the film is devoted to her efforts to gather knowledge about Swedish political and ethical attitudes, and her efforts to change some of these, particularly those which support the "class society" and "violent" military systems and methods of defense. The young girl is curious; in the course of the film she learns much about Sweden and herself. Some of what she learns makes her angry. She pickets and protests against some of the political and social situations, seeks sexual freedom of the sort enjoyed by men, and rebels violently against her boyfriend who conceals his love life with other women from her.

The film presents ideas concerning nonviolence. Another theme concerns ideas and attitudes regarding class society. The ideas are first presented somewhat abstractly, through interviews of men and women on the street, at the

airport, in their offices, at meetings, at an induction center, etc. Gradually, the themes are personalized: the ideas are shown as they work in and on the film's main characters, on Lena, the girl, Borje, the boy, and Rune, the father; and, also as they work on the director and the drama student.

"Is Sweden still a class society?" This idea is introduced in Lena's interviews, first on the streets, among faces in the crowd; then by her provoking questions in the Labour Movement headquarters; and by the interview with Olof Palme, who is a minister in the present Swedish government. This is immediately followed by the first human illustration, in the editing room. An aspect of the class society is that people use each other; they climb on one another to get ahead in their careers. The film director uses the drama student. She in turn uses the director. The idea of nonviolence is also introduced by interviews: first with the American Negro leader, Martin Luther King, Jr.; then by interviews with young men at an induction center. Soon Lena is taking action on behalf of the idea: making propaganda against military defense and preparing pamphlets on nonviolent techniques. She has an important idea of her own: Sweden should change from a standard military defense to a new type of nonviolent defense.

The class structure idea is further developed in Lena's protests and agitations. She criticizes "right-wing" persons, mocks the conservative paper of Sweden, asks the Russian Embassy if the Soviet Union has created a new sort of class structure. She questions the morality of Swedish tourists returning from Franco's Spain, interviews the old Swedish king (a symbol of the traditional class society); takes part in demonstrations against the U. S. war in Vietnam, expressing the contemporary Swedish disappointment in the American development. She discusses with the Soviet poet Yevtuschenko the problem of freedom and force in a starving world; societies with free enterprise system versus socialism; the American model versus

the Russian and Chinese models. The nonviolent-defense idea is developed by presenting the utopian idea as if it were already in practice. A nonviolent "sabotage" man is interviewed in his factory. Young people are shown training and exercising "socio-drama" at a railway track, along lines developed by Martin Luther King's movement. A decision by the Swedish parliament to change to nonviolent defense is presented through a TV news report.

While this reportage and these discussions go on, the film's ideas gradually develop so that we see how they work on the human level, in ordinary human beings; we see a series of clashes between personal dreams and reality. Thus, the father has not been able to carry out his socialist's dreams; reality has crushed him, he has resigned and escapes into inactivity, heavily sleeping, a wasted life. The boy, Borje, is trying to get ahead in the Swedish class society, voting right wing or liberal, leaving his job in a clothing shop in order to become an automobile salesman: a profession that offers him fine opportunities, tax-free income, and a white sports car for his personal use. Reality, however, is less kind: by the film's end, Borje is on the brink of being fired from his job. It is the relationship to Borje which brings Lena into her most difficult personal crises, with ideas and reality colliding.

In the beginning Lena doesn't know herself very well. She wants to be nonviolent, admiring Martin Luther King, but she has a great deal of anger inside her. She can be happily singing "We shall overcome", riding on her bike — until she is splashed with mud by a speeding car; then, she screams and swears. She can make herself an altar with a peace symbol, a broken gun; but when Borje arrives in his car, breaking up her religious-like retreat, and destroying her inner peace, she loads and fires the gun at him. Lena's development is a story of someone who becomes conscious about herself and her motives. This growth in awareness is painful. It is most vividly brought out by Lena's sexual involvement with Borje, an involvement

which is portrayed in a number of candid and explicit scenes where they make sexual love with passion (the scene in Lena's room), with humor (the scenes on the palace balustrade, in the old tree, and in the country pond), with savageness, anger and tenderness (the scenes immediately after the shooting and later in the empty cabin).

After their first happy time together, where no conflicts are apparent, the latent problems in the relationship of this young couple gradually appear and eventually explode, in a love scene. Feeling injured by his attitudes towards her, and her own inability to resist his appeal, Lena reacts against Borje, in hate and aggression. She has a fantasy which reveals a wish to kill him, and castrate him. That brings an important moment of self-recognition. Discovering the hate that is inside her, she again leaves Borje, and, while riding away, in another fantasy, speaks to her idol, Martin Luther King, and tells him she cannot be with him any longer. "You need people who can carry out your ideas without hate." Lena cannot. In a while, she cries like a child, and tries to comfort herself by gorging on pastries. At this moment, the TV broadcasts that the Swedish government has reached a decision to change its policy to one of nonviolent defense. Lena cries again, but this time with relief. The Idea is greater than she is. Even if she can't live up to it, the Idea is there and lives on: it can be carried further by others.

This is the moment in the film where the different ideas integrate in their most human way. From now on, until the end, the discussion is carried on at this human level, ending in the destruction by Lena of her own files. Having discovered the aggression inside herself, she acts it out: in the attack on her father, in the destroying of her archive, in the symbolic killing of Franco, the dictator. The two thematic ideas have been shown in inter-action: a world crying for social changes, challenged by the dream of nonviolence, confronted with feelings of the inevitability of violence.

APPENDIX G

Dr. Paul Yaffe, the State's first witness, explained that he is a full time employee of the Department of Education; that his field of study was "basically in education" where he earned his Ed.D. degree; that he holds no degrees in psychology; but that he has taken courses at various institutions in "the projective techniques and psychological techniques of the clinical psychologist" (E. 31, 39, 40).[1] He did not pretend to be knowledgeable in the area of films (E. 35)[2] and, at the suggestion of counsel for the State, he declared that he was "not an expert on motion pictures", but that his testimony would be based on his "expertise in psychology" as "applied to the motion picture media" (E. 36).

The witness said that he viewed the film on July 8, 1969 and that he "felt the dominant theme was sexual" (E. 40, 41). He reached his conclusion, he testified, by applying "a kind of yardstick that has been utilized by Drs. Phyllis and Everhard Kronhausen in determining what constituted pornography or obscenity from a psychological frame of reference" (E. 41). Asked whether the film presented "anything of socially redeeming value," he replied that "the socially redeeming situation is, in my opinion, shallow . . ." (E. 46). He added, however, that, "I want to say very candidly that when I first saw the film I was quite puzzled about what to do because I was impressed with the fact that there were all the earmarks of socially redeeming features", but, "on careful thought," he continued, he began to believe that he was "being taken in" (E. 46).

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[1] His course work was sufficient to qualify him to practice as a psychologist. He said that he has "maintained" his skills through private practice in the evening, agreeing with the characterization that he "moonlights in the psychology" (E. 40-42).

[2] The only reading on motion pictures which he could recall was part of a "catalogue" published by the Museum of Modern Art (E. 34-35).

"When did you first arrive at your first opinion that the film did have all the earmarks of socially redeeming value?" Dr. Yaffe was asked on cross-examination, and he answered, "As I was viewing it" (E. 47). After seeing the film, he testified, he left the screening room and had a discussion with Mrs. Margery Shriver, the Vice Chairman of the Censor Board. He told her, "that I was puzzled about this film because I felt it was not going to be an easy one to say yea or nay to" (E. 48). Asked specifically whether he had not told Mrs. Shriver "At the time of your first conference after you viewed the film, immediately afterwards, that you could not say it was utterly without redeeming social value?", he answered that he had told her that, "it was not clear" (E. 48). Mrs. Shriver then discussed the film with him, and, "When I left," the witness said, "I had agreed that I would be willing to testify" (E. 50). Counsel for the Appellants attempted to inquire into the substance of the conference that had converted the ambivalence into the final expression of willingness to testify, but counsel for the State objected to it as hearsay. The Court foreclosed the inquiry, sustaining the objection over the insistence of counsel for the Appellants that the questions were proper (E. 52, 53).[3]

[3] In his discussion of the substance of the film during cross-examination, Dr. Yaffe explained that in his view the film portrays "a kind of flitting about for causes." Asked whether "that doesn't amply describe a lot of our young radicals?" he answered "It may do so" (E. 70). The girl in the film, he said, was rebelling against many things (E. 78), and "she was constantly searching *for ways in which she could be supporting or extending* the idealistic move that her father had made many years ago" (E. 78, 79). In spite of her attempts to embrace nonviolence, her "complex" and multiple disappointments in her personal relationships ended in a violent "explosion" or "projection" against her father of "all of her accumulated disappointment" (E. 80-1). The development of this story, the witness conceded, is "valid psychologically" and it is the sort of thing that he sees in his own part-time practice (E. 81).

The cross-examination of Dr. Yaffe also produced disclaimers of the very elements on which his psychological analysis was said to have been based. He acknowledged, for example, that the essential elements of voyeuristic appeal were absent from this film and that it is made clear to the audience that they are not witnessing real sexual activity but that they are only witnessing "make-believe scenes" in a play (E. 43, 44, 56, 57, 61). He also admitted that he had been in error with respect to essential facts on which his conclusion had been founded and he sought to excuse his inability to recall accurately what the film had portrayed by saying that he was "hopelessly confused" and that the film "hasn't stuck" with him "too well" (E. 55, 57).[4]

Dr. Yaffe also displayed a remarkable unfamiliarity with the authorities on whom he had thought he was relying. He confessed that he had never read the Kronhausens' text but only a chapter which they had contributed to an encyclopedia (E. 65). After he agreed that the film contained "a preponderance of material other than the sexual material" he added that he had never timed the sexual material because "from my point of view it is irrelevant" (E. 86). When it was read to him that the Kronhausens have said that a work, to act as an erotic stimulant upon the spectator, "must not tire him with superfluous non-erotic descriptions of scenery, character portrayals or lengthy philosophical expositions," he admitted that he had never heard that thought expressed "in this form before" (E. 65).[5] Other excerpts from the Kronhausen text

[4] He had emphasized that the film "carefully avoids" unpleasant "after effects or side effects of sexual relationships", only to admit later that the sexual activity of the characters had resulted in their contracting scabies and having to be deloused at a DDT center (E. 45, 54).

[5] The Kronhausen comment was directed specifically toward erotic literature. Asked whether it would not apply to movies as well as books, Dr. Yaffe answered, "Well, I think so" (E. 67).

were read to the witness, and they evoked such responses as, "I would say I have not heard it, and what I am really thinking about is whether I would subscribe to it" (E. 78).

The State's second witness was Reuben Kramer, a sculptor, who was tendered as an expert on the existence or absence of "redeeming value" in the movie (E. 89). He conceded that he is not an expert in "the cinemagraphic art medium" or even a movie goer (E. 90, 91).[6] Mr. Kramer was permitted, over objection, to express the opinion that the film was "inartistic" (E. 116). Asked to give the reason for his opinion, he said that he had reached that conclusion, "for the simple reason when you have a sex scene like that, which has been so — shown in such a debased form as to expose it in public without any artistic merit whatsoever, to me that has contaminated the picture" (E. 92). "(R)egardless of what message the film had," he elaborated, "this has contaminated the picture to such a degree where I think it is a parallel with Dr. Yaffe's statement that if you have a glass of water with only one microbe in it, the water is not good any more because it has been contaminated" (E. 95).

To the question, "What did you think of the quality of her acting performance as a form of art?" Mr. Kramer replied, "That was the most realistic bit of acting I ever saw. She certainly must know her business" (E. 107). When asked other questions about the artistic aspects of the picture, this witness begged off, saying "I am not qualified to judge whether they were doing a good job artistically" and, "If it is discussing the quality of the movie, I am not qualified" (E. 112). Mr. Kramer also made it clear that in his testimony he was "absolutely not" expressing any opinion "as to the relationship of the depiction of sex to the development of the characters" in the film or "to the development of the idea that the director was

[6] He said that he has "no interest in the art of such people as Godard . . . Fellini . . . or Bergman" or in "the artistic talents of directors" (E. 91).

trying to convey" or to "the relationship between the sex scenes and the political or moral viewpoint that the director may have had" (E. 117-118).

When asked whether he would say that the picture would have artistic value if the sex scenes were removed, Mr. Kramer replied that, "I would say probably it would have been a nice movie" (E. 96), "a movie I might go see myself if I had the time" (E. 96). The full extent to which these comments constitute praise of the film was made clear later in Mr. Kramer's testimony when he was asked, "Isn't it true that you have expressed the opinion in the past, in this Court, that in your view very few films have any artistic value?" and he answered, "I guess so. It sounds like I might have said it." There was read to Mr. Kramer his testimony in another case in which he said, "Very few films do [have artistic value] . . .; they are just stupid." When he was asked whether he remembered making that statement, he said: "I very likely could have made it. I wouldn't make it in reference to this. This is not stupid" (E. 105).

John Henry Lewin, Jr., Esq., the State's third witness, is a practicing lawyer and an associate in Venable, Baetjer and Howard, a Baltimore law firm (E. 125). For a period of about two years, until April, 1968, while he was an Assistant State's Attorney, he devoted approximately ten hours per week to the review of material of questionable obscenity and he prosecuted six or seven obscenity cases (E. 127-128). In his review of these materials, Mr. Lewin testified, he would "apply the three tests of the Roth case:" he would "make some determination as to whether or not the dominant theme or intent of this material appealed to the prurient interest;" he would "make some evaluation . . . as to whether or not the material was utterly devoid of redeeming social value"; and he would make some determination as to whether the material exceeded contemporary community standards in the depiction or representation of sex (E. 130-132). In the past year, the private practice of law has occupied fifty to sixty hours of each week of his

time, and, consequently, he said, "I don't make it a purpose to try and keep current on what is actually showing" (E. 132).[7]

He saw the film, Mr. Lewin said, at the request of Mr. Biddison, his friend (E. 147, 159). He could not recall the date of the viewing or whether it was before or after the Board had acted. Mr. Lewin was allowed to express his opinion that "there are portions of that film which go beyond the contemporary community standards in depicting sexual matters," and he specified these as the two sex sequences which take place on the retreat, the one on the grass and the other in the barren house, and the scene of "a dream fantasy" in which the girl "imagines herself castrating" her lover who has left her (E. 146-147). Except for these "three scenes," he repeated, the film did not exceed contemporary standards (E. 153). The community standards were generally the same, he thought, in "urban areas such as Baltimore, New York, San Francisco, Los Angeles . . ."

When Mr. Lewin was asked on cross-examination whether he has not expressed the opinion that he does not, himself, "find it [the film] to be offensive," counsel for the State objected, insisting that "Any opinion he might have as to the whole movie is irrelevant and it is just, your Honor — it doesn't have any place in this trial" (E. 150). The objection was overruled and the witness answered that he has expressed that opinion on more than one occasion (E. 150-151). Later on, at the request of counsel for the State, the trial judge reversed his original ruling and struck the answer (E. 162-163). Mr. Lewin was also asked whether it was not true that he had not also "expressed

[7] He was unfamiliar, he agreed, with many of the shows currently on the Broadway stage, and he had not seen such films as "I A Woman, Part II," which had been advertised in the Evening Sun of July 11, 1969, as "Ten Times More Than 'I Am Curious (Yellow)'" and "Sweden, Heaven and Hell," which had been advertised in the Evening Sun of July 16, 1969, as "More Provocative Than 'I Am Curious (Yellow)'" (E. 133-134, 135-136).

the opinion that the dominant theme of this movie is not an appeal to the prurient interest" (E. 151). The Court sustained an objection to the question, and counsel for the Appellant proffered that "(I)f this witness is permitted to answer the question he will testify to your Honor that he has expressed the opinion that the dominant theme of this material, this film, taken as a whole does not appeal to a prurient interest in sex" (E. 151). Finally, he was asked if it was not true, "that you have expressed the opinion that the material in this film is not utterly without redeeming social value," and, when the objection to this question, too, was sustained, counsel for the Appellants proffered that "that if this witness were permitted to answer the question, he would testify that, in his opinion, the material or the film is not utterly without redeeming social value" (E. 152). If Mr. Lewin were to be recalled to the stand as a part of the defense case, the Judge said, his ruling with respect to these questions would be the same (E. 163).

The State's last witness, tendered as an expert "in the field of literature," was William S. Forshaw, an employee of the Enoch Pratt Free Library (E. 164). Mr. Forshaw testified that he holds a master's degree in library science and that his function, as a senior subjects specialist in the humanities section, is "helping the public select material in the field of poetry, drama and also administrative duties, such as time schedules and so forth" (E. 165). He is not in the Pratt film department (E. 168). He is "interested in the preservation of the American film," and, in pursuit of this interest, he has acted, in an "extra curricular" capacity as a consultant to the Baltimore Museum of Art (E. 165-166). He said that he was also interested in films from the "international viewpoint," and, he emphasized, "I am largely concerned with the critics' reaction to films" (E. 165-166).

He viewed the film, Mr. Forshaw testified, at the request of the State when the trial was already in its second day (E. 187-188). In response to questions on direct examina-

tion, he voiced the conclusions that in his view "the dominant theme of the movie is sexual"; that he "believed" the film exceeded contemporary community standards in the depiction of sexual matters (E. 172, 175). When asked on cross examination, "Now would you say that your view as to what you think is the dominant theme, for example, would differ from the majority view of those people who are in your profession?" he conceded that, "On the basis of those who, among my colleagues and friends, have seen the film, I would say there is a small percentage so far — I am trying to say that I believe that I am in a minority in this instance" (E. 221). And further, to the question, "And would you also say that your opinion with respect to the existence or non-existence of socially redeeming value, literary, artistic value, is a minority opinion among your colleagues?" he answered, "Among those who have seen the film, yes. I cannot speak for everyone I would have in mind" (E. 222). Asked whether he would name some of those professional colleagues who had expressed views favorable to the film, he said that he "would prefer not to" (E. 221).

In connection with his expressed "concern about the critics' reaction to films," Mr. Forshaw said that he reads the reviews of Hollis Alpert in the Saturday Review and that he recognizes him "as a competent critic"; that he reads the reviews of Stanley Kauffmann whose judgment he values and who had made a "worthwhile contribution" to the film literature and is "a good critic"; that he "values the judgment" of John Simon; and that he regards the judgment of Richard Schickel, the film critic for Life Magazine, "as being a judgment of value in the criticism of films" (E. 169-170). Before testifying, the witness said, he had not known that Messrs. Alpert, Simon and Kauffmann had "expressed any opinion with respect to this film," and, although he understood that Mr. Schickel had written a review, he had not read it. When he was shown the reviews that these men had written, and when he discovered that they were favorable to the film, his reactions varied from

admitting the "possibility" that they were correct to disagreeing with them (E. 181, 188-189).

Mr. Forshaw had testified on direct examination that some time ago he had read the diary of the making of the film which the director, Vilgot Sjoman, had published and which is entitled, *I Was Curious*. It developed on cross-examination that he had read the book as a prospective selection for the Pratt Library; that he had recommended that the library buy it; and that he thought that "it had something to say about the films" and "about the serious techniques of film making" (E. 240). He also agreed that in this instance the director "was attempting to make a legitimate film" and that the director "is a serious student of the . . . European film makers" (E. 185-186).* The 7 East Theater in Baltimore, where this film is proposed to be shown, Mr. Forshaw testified, is commonly known as an "art theater" (E. 211). The films shown there, he said, are best described as "more intellectual" or "avant garde" (E. 212). It would be fair to say, he continued, that it is not a theater that "caters to the gum-chewing, popcorn-eating crowd" (E. 213).

After Mr. Forshaw had commented upon the psychological, political and sociological aspects of the film, and

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* At one point, at the suggestion of counsel for the State, Mr. Forshaw said that he saw some of the "techniques" of stag films in the film in question. Asked to explain, however, he said that he noticed that the girl and boy characters are shown in a scene with the top of the automobile coming down over them, and he remembered having seen a stag film in which "the couple get back into the car and this is supposed to be the end of the film" (E. 175-176). He has seen other films in American film theaters, he said, that remind him of stag films (E. 208). In his entire life, he said, he had seen five stag films, the last of which was in 1954 (E. 190). It never occurred to him to determine how much time in the subject film was devoted to sexual matters (E. 190), and he catalogued the many ways in which the present film is not at all like a stag film (E. 196-198). He also said that he thought that the director in this case "copied other techniques" of the well known French director, Jean-Luc Godard and those of a director known as Bunuel (E. 174).

after counsel for both sides had announced that they had no further questions, the Court conducted an inquiry. In answer to the Judge's question, Mr. Forshaw said that the story and the political and social commentary in this film could not have been depicted without sexual scenes. The sexual material in this film, he continued, is important to the expression of the director's commentary on nonviolence, politics and social issues." He also acknowledged that he has noticed "a tendency toward greater candor in the representation of sexual matters in recent years" and that "there are shows now being shown on the Broadway stage, live, with live casts, that are at least as explicit and perhaps more explicit than what is shown in this film that is involved in this case" (E. 213, 214, 216).[10]

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[9] "(The Court) I have just one. Whatever the story is, if there is a story—political, social or whatnot—could it have been depicted without these sexual scenes?

(Mr. Weiner) Objection.

A. No.

(Mr. Biddison) Did you understand the question?

(Mr. Weiner) Objection withdrawn.

(The Court) What?

(Mr. Weiner) I withdraw my objection.

Q. (The Court) Well, let it stand with an objection and I overrule the objection, and then let the record show if you want to withdraw it. Go ahead. Why does it have to be? Why does it have to be told in terms of sex? A. Because the director admitted in his diary concern with this aspect of his own private relationship with the actress.

Q. (The Court) Why do you have to express violence, nonviolence, politics, Vietnam, what-have-you, various conglomerations of things that show up, I would suggest, at random in the picture—why does that all have to be expressed in terms of sex? A. I do not know. It is though." (E. 241-242).

[10] The witness said that he had just recently seen a show entitled "Oh, Calcutta!" on the Broadway stage and that he had seen this show for pleasure (E. 226). This show displays both male and female nudity, with the genitalia fully exposed; 75 percent of the show is performed in the nude, and there are included in it acts of simulated intercourse and masturbation (E. 227). The witness said that he enjoyed that show and that he thought that it had artistic value (E. 227-228).

APPENDIX H

Dr. Richard A. Macksey, Acting Director of the Humanities Center, Johns Hopkins University, was the first witness to testify on behalf of the Appellants. He has taught more than a dozen different courses about films and filming, including courses in film history, theory, esthetics and drama (E. 244-245). He has published books and articles on literature and film criticism and he has conducted a radio program on the CBS network relating to art and film review. He has been an editor for the film journal entitled "Film Heritage" (E. 247-248), he has lectured widely on the subject (E. 245-246), and he is a member of the board of the Maryland Film Festival (E. 248). His reading has included books published on the film in four foreign languages, he subscribes to five periodicals on the film and he regularly reads the reviews of respected critics. He sees more than 100 films a year, half of them foreign films (E. 248). He has looked at films for the State Board of Censors and he has been consulted by the State's Attorney for Baltimore City for his opinion with respect to possible obscenity (E. 248-249).

The film "I Am Curious (Yellow)" should be understood, he testified, in the context of the "film makers in Sweden" who have made an "enormous contributions to films" (E. 252-253). In the shadow of Ingmar Bergman, the master director, he said, there have worked a number of younger film makers, "notably" Sjoman (the Director of "I Am Curious") and Widerberg (E. 252-253). Sjoman, who had been a "rather successful" and "serious" novelist[1] is also "a serious film maker" (E. 261). He has looked to those French directors, such as Cris Marker and Godard, who had been experimenting with "documentary techniques," and he has attempted to incorporate those techniques into his use of the film as a vehicle for social expression (E. 253).

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[1] He has also written an "interesting series of articles" critical of Hollywood and its techniques (E. 261).

The film in question here, Dr. Macksey, explained, explores social attitudes by raising many questions. It is concerned with "conflicts between generations," with "the kind of malaise of the so called welfare state in Sweden, the ostensible classless society" with "the doctrine of non violence as this relates to Sweden's peculiar role in Europe" and with "the face of reality" (E. 254). The inner story is "chosen not to turn away from the social and political issues, but to implicate them" (E. 257-258), and it is "not just a crutch for a few sex scenes" (E. 258). The social commentary is presented, for artistic reasons, in an "irreverent and abrasive" fashion (E. 255, 313). The film, he continued, has social value (E. 267) and it possesses artistic merit (E. 321). In particular, "The editing, I thought, was quite brilliant" (E. 215), and, "The editing principles were artistic and not commercial" (E. 255). "At its best," the film is "comic and irreverent," and, "At its worst, it is just terribly serious" (E. 262).

Dr. Macksey also testified that the film would appeal mostly to the person who attends "art houses" and enjoys foreign films. The 7 East is just such an "art house," he testified, and it is one of the places where "over the years" there have been shown "most of the foreign art films in town" (E. 265). He said that this film fits in with the kind of art pictures that are generally shown at the 7 East (E. 265-266).[2] He added that the organizational principles of the film might perhaps not be entirely clear "to someone who hasn't seen some of the films that filth makers made in the last four or five years" (E. 311-312), but that even such a person, if he were "average", would not fail to perceive life's "complexity of relationships" and the "identity crisis" of the girl in the inner story (E. 312).

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[2] It is "unfortunate", he commented, that those who have sought to censor the film have given it such "billings" and "publicity", for it has been given "more notoriety than it would have had, had it simply appeared as an ordinary picture" (E. 285). "(I)f it hadn't been for the statements made by those who had censored the film, it would probably long since have closed in New York" (E. 272).

Sex is not the dominant theme of the film, Dr. Macksey explained, and "the number of scenes where there are naked bodies on stage is probably only about six minutes" (E. 287). The sexual scenes are brief, the one on the grass lasting only about 70 seconds (E. 282), and they are presented with a number of "distancing effects" such as constant interruptions, so as "to remind the audience that this is not life, but a film about a film being made about life" (E. 257).[3] "I think," he observed aptly, "that the time it takes you in some cases to describe some of these acts might be longer than the actual presentation on the screen. This is one case where I'm not sure one can say talking about or describing something is not more provocative than showing something" (E. 291). This film, he said, is "much less suggestive and leering than a great many films that show a few square inches less of anatomy." (E. 266). The sex scenes are artistically justified (E. 321), they were included in this film in the valid exercise of the director's artistic judgment (E. 323), they are related to the rest of the picture (E. 258, 274) and if they were to be removed the film would be "pretty spotty" and would "verge on incoherence" (E. 317-318).

The next witness was Dr. Lincoln F. Johnson who, "for approximately a decade" has been chairman of the Fine Arts Department at Goucher College (E. 327). He has been engaged in the serious study of motion pictures for 18 years and motion pictures have been his primary subject of study, research and teaching for "the last six or eight years" (E. 327). He regularly teaches courses in the history of motion pictures and film production (E. 327).

[3] The film would not be stimulating, he said, except to the most "sexually deprived person" (E. 285, 294). A person who went to see this film "for reasons of sexual stimulation" would reach "maximum frustration as far as what he wasn't seeing in the film" (E. 297). This film, he said, "has less obsessive concern with sex and suggestive representation of some of the things you describe than a number of other films shown commercially," and "There is much greater emphasis on perverted sexual acts in 'The Killing of Sister George'" (E. 313).

He has served on the jury of selection for the American Film Festival (E. 327). He sees "between 100 and 150" *feature length films* a year, and a great many shorter films as well (E. 328). He has appeared as an expert witness for the State in the Criminal Court of Baltimore City with respect to pornography E. 328).

He viewed the film in question here and, he said, "It is a film, in my mind, of exceptional merit" (E. 340). He also described it as "a very significant, historically important film" (E. 318). "It has cinematic merit" he continued "in a number of ways" (E. 335). In its structure, "Sjoman recognizes that in looking at life, or in experiencing life, things don't fall into neat categories and developments . . . that there is a constant bombardment, if you will, of our senses and of ideas from all directions" (E. 335). "What I find very, very beautiful about the structure of this movie is that the structure itself reveals this lack of clarity, while maintaining a form of clarity" (E. 335). The film is made as "an attempt to grasp . . . this . . . very quality of life" (E. 335). This film, he finds, "is rythmical, like a piece of music, which a good film, in my mind, should be, so that he has given normal order to this expressed disorder" (E. 336). The film is also unusual in its intertwining of documentary material with fictional material and its weaving of the director's "personal experience into the experience of the culture as a whole" (E. 336-337).

The dominant theme of the film is not sex, he said. The film explores "the state culture . . . in its broadest interpretations" and "with great integrity probes current opinions". It is concerned with "the unthinking acceptance of traditional values", the theme of violence versus nonviolence "in both public and personal life;" the "relationship of an individual personality to the social structure" and "it is an examination of the generation gap" (E. 332-333). Social attitudes are explored not only through the interviews and scenes of demonstrations "but also through the conversations of Lena, through . . . the development of her particular character" (E. 333).

The integration of the sexual theme with the others, Dr. Johnson said, is one of the "very interesting accomplishments of Sjoman" (E. 334). He has used the material as a means "of revealing a character", to reveal "a great deal about personal attitudes and about social attitudes" and "it is in a large part through the sexual activity that Lena begins to discover what she actually is". Summing up the relationship of this material to the film, he said that, "Sjoman, it seems to me, has dedicated himself with the greatest integrity to presenting an honest picture and, I think, an honest picture of Sweden and of youth and of humanity, and I think that if he were to cop out on the sexual theme the film would lose a great deal of its integrity, so that directly and indirectly these sexual themes or sexual scenes are important to the whole process of the development of the movie" (E. 335).[4]

Dr. Johnson contrasted the honest portrayal of sex in this film with other films which might better be classified as pornography, at least one of which was then currently playing at the Uptown Theater in Baltimore. After describing how that movie, entitled "Sappho Darling", "was concerned from the beginning to end with sex,"[5] he stated

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[4] This film fits in well with the other films of merit and foreign origin, he said, which are generally shown at the 7 East. The 7 East, he commented, for its choice in foreign films has had "a tremendous cultural influence in this community for the good" (E. 340).

[5] In "Sappho Darling": "You were never allowed to forget sex, except for one moment when one of the ladies involved recited 'Now I lay me down to sleep', an ironic intrusion. In this film there was a gang rape by five men who chanted during this rape 'Gang bang; gang bang; gang bang.' There were three or four representations of orgasm. There were three representations of sexual intercourse. Males and females both handled and kissed female breasts. There was again a simulated cunnilingus. In addition to the gang bang, there were two attempted rapes. There was lesbian activity. The vocabulary that was used can be exemplified by one or two words—cock teaser, AC-DC" (E. 338).

that, "Now, quite frankly, I find it very, very difficult . . . to comprehend how the Censor Board can pass a vulgar meretricious exploitation movie like this and cause trouble with a serious film by a serious film artist on social themes like 'I Am Curious (Yellow)'" (E. 338). Similar films which have also played in the Baltimore area, were described by the witness (E. 336-337). The sex scenes in "I Am Curious (Yellow)", Dr. Johnson related, are presented with "almost clinical naturalness" and the director's techniques contrast sharply with the cutting, music, lighting, "frumpery" and "phony build-up" that are the tools of the pornographer (E. 339). "Sjoman acts in a manner that is honest" but he is careful in every case, in depicting a sexual scene, to divert the attention of the audience (E. 339).

Dr. James Mackie, Chief of the Division of Clinical Psychology of The University of Maryland Medical School, testified as to the psychological impact of the film. He has participated in research programs with respect to sexual stimulus on individuals, including a study relating to the influence of projective material on sexual arousal and fantasy of normal people (E. 375-376), and he teaches courses in sexual behavior and projective techniques to psychologists and graduate psychiatrists (E. 372-373).[6] He reviews sexual research material and writes articles on new areas of sexual investigation. The dominant theme of the film, Dr. Mackie said, is not an appeal to a prurient interest in sex, and the film would not be arousing to the average person.

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[6] He has also served as consultant in psychological problems to the Peace Corps, Vista, the Governor's Committee on School Problems and The Baltimore City Department of Welfare (E. 374). He has been the Managing Editor of the Journal of Nervous and Mental Diseases (E. 373-374). He has also been a consultant to WJZ-TV in Baltimore on programs appropriate for children (E. 374). Before holding his present post, he was Chief Psychologist in the Division of Child Psychiatry at the University of Maryland Medical School for three years.

For a motion picture to be sexually arousing "there are certain characteristics which must be part of the presentation of the sexual scenes" (E. 377). Those characteristics are absent from "I Am Curious (Yellow)", he said, and he explained his answer in detail.[7] He was thoroughly familiar with the Kronhausens' work, which had been mentioned by the witness Naffe, and he described how the material which is obscene under the Kronhausen test is "flagrantly" and "dramatically" different from the material in this film (E. 404). The film is simply "not pornography" (E. 383). The portray of the sexual behavior, moreover, is "consistent with the themes of the film" and "the important thing" is that the sexual portrayal makes "cohesive psychological sense" (E. 405). "Both of the chief characters, the hero and heroine, are quite fully developed," the "sexual portrayal of the characters is integrated in with the portrayal of their other aspects," and "the sex act in this film was always part of the complexities of the relationships between the two people" (E. 378, 381). The average person would understand "the psychological connection" between the sexual scenes and the rest of the film (E. 409).

Dr. Anke A. Ehrhardt, Instructor in Medical Psychology in the Department of Psychiatry, Johns Hopkins Hospital, agreed fully with Dr. Mackie's evaluation of the film. Dr. Ehrhardt, who is engaged full time in the treatment and study of behavior as it relates to sex, and who is familiar

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[7] One method of prurient appeal, absent here, is the use of such highly suggestive techniques which "permit the viewer to fill in with his own fantasy" (E. 378). In a frankly pornographic film, the characters are presented "in single dimension" and "there is a general effort to streamline all of the action to emphasize the sexual act. Here, on the other hand, the characters "are quite fully developed as rounded individuals" (E. 378). The film avoids prurience by the manner in which the characters are presented, the manner in which their acts are portrayed and the focus, emphasis and development of the sexual material in general (E. 378, 379, 399-401).

with the latest work which has been done on the erotic stimulation of films, similarly expressed the opinion that "I Am Curious (Yellow)" does not appeal to a prurient interest in sex in the average person (E. 518).[8] She explained, first, "that the sexual scenes and the sexual aspects of this movie are subordinate to a much larger concern of this movie" (E. 518), the much larger concern being the political, sociological, philosophical and "interhuman" development of "self-identification" (E. 519). The sexual material is presented in a manner so that it is not "erotically arousing" (E. 519). The sexual activity of the girl character, Dr. Ehrhardt agreed, "is very consistent with the other aspects of her personality" and it is an "important" part of her development (E. 519, 527). Even in the most explicit scenes at the retreat, which were emphasized by the State, "other aspects of their relationship, the human relationship between these two people, were much more dominant . . ." (E. 521).

Dr. Peter Rossi, a sociologist and Chairman of the Department of Social Relations at Johns Hopkins University, also testified. He was, for twelve years the director of the National Opinion Research Center at the University of Chicago (E. 410). He has acted as a consultant in sociology to three Presidential Commissions, and, most recently, to the Commission on Pornography which was established by the Congress (E. 410). Dr. Rossi testified that the film "has social significance" and that it portrays "the kind of struggle for a new way of life being expressed by young people throughout the world in a variety of ways" (E. 412). The film is concerned with the "false and hypocritical distinction" between public and private life, and it teaches that "one should search for honesty, not merely in public life, but also in private relationships" (E. 412). The girl

[8] She has lectured on the psychology of sexual behavior at universities and hospitals throughout the world (E. 516) and has published extensively on the subject of the psychology of sex (E. 516-517).

character is "very much" a "believable person in the light of today's younger generation," he related (E. 413-414). "It seems to me", Dr. Rossi said, "the sexual theme is part of the whole web of the story which the director is trying to put across" (E. 413). Although he does not think it is the "dominant theme" of the film, the sexual material is "important" and "an integral part" of it. "It would be not quite an honest picture," he thought, "if the sex theme did not appear there" (E. 414).

Space limitations do not permit a more detailed review of the testimony of the other witnesses who spoke of the film's merit. Dr. Irving M. Brown, Director of the Fine Arts Program at the University of Maryland, whose specialty is "dramatic literature" and "theater arts" (E. 487-488), said that the film has artistic merit (E. 490); that sex is not the dominant theme or even one of the predominant themes (E. 489-490); and that the sexual sequences were related to the predominant themes, particularly to "the girl's search for herself and meaning and her relationship to life about her" (E. 490, 492). And, continuing: "I would say that I didn't feel that any scene was superfluous or should be excluded. The film as such was an artistic whole, and I wouldn't have tossed out anything. I was not looking at anything that shouldn't have been there, any scene that wasn't excessive. By excessive, I mean in excess of what was needed to make the point" (E. 493). Dr. Ronald H. Paulson, Chairman of the English Department, Johns Hopkins University, an expert in literary criticism, is interested in films as "the really exciting contemporary art form," and he sees an average of two a week (E. 434, 435). "Sex is one of a number of themes" in the subject film, he said, but it is "by no means the dominant theme" (E. 439). It is ". . . one small aspect . . . but an essential one" (E. 439). "I Am Curious (Yellow)", he concluded, is a film "certainly with artistic, esthetic merit" and also with social merit because "it is dealing with important social problems" (E. 440). In including the sexual se-

quences, the director's "intention was honesty"; and they are handled technically by him "to destroy the erotic effect" (E. 443).

Jaromir Stephany, Chairman of the Department of Photography and Films at Maryland Institute, has viewed films regularly as an expert for the Censor Board and has testified three times on their behalf (E. 432).[9] The film in question here, he said, is a product of a serious effort (E. 537), and it is "rather strongly put together" (E. 538). It has artistic value and "is certainly one of the outstanding films" of the year (E. 538). It is most easily understood by "younger adults" (E. 438). Sex is not the dominant theme, he said, but the sexual material is important to the film. "In other words", he concluded "if these were cut out or modified in any way, the film would be destroyed" (E. 535).

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[9] He teaches courses in the making, history and esthetics of film (E. 531). He also has been Curatorial Assistant of the George Eastman House, one of the three archives of films in the United States (E. 531). He has a master's degree in fine arts (E. 532).

APPENDIX I

Cities Where "I Am Curious (Yellow)" Is Playing or Has Played as of November 5, 1969

ALABAMA
Birmingham

ARIZONA
Phoenix

CALIFORNIA
Berkeley
Concord
Los Angeles
Oakland
Palo Alto
Riverside
Sacramento
San Bernadino
San Diego
San Francisco
San Jose

COLORADO
Denver

CONNECTICUT
Bridgeport
Hartford
New Haven
New London
Norwich

DISTRICT OF COLUMBIA
Washington

FLORIDA
Miami Beach
Palm Beach
St. Petersburg

HAWAII
Honolulu

ILLINOIS
Chicago

MAINE
Bangor
Portland
Waterville

MASSACHUSETTS
Boston

MICHIGAN
Detroit

MINNESOTA
Minneapolis

MISSOURI
Kansas City

NEVADA
Las Vegas
Reno

NEW JERSEY
Atlantic City
Lakewood
Oaklyn

NEW MEXICO
Albuquerque

NEW YORK
New York City
Utica

OHIO
Cleveland
Columbus

OKLAHOMA
Oklahoma City

OREGON
Eugene
Portland

PENNSYLVANIA
Philadelphia
Reading

TEXAS
Houston
San Antonio

VERMONT
Burlington

VIRGINIA
Norfolk
Virginia Beach

WASHINGTON
Seattle
Spokane
Tacoma

APPENDIX J

Article 66A, Maryland Stat. Ann.

MOVING PICTURES.

§ 1. Definitions.

The word "film" as used in this article shall be construed to mean what is usually known as a motion picture film and shall include any film shown with or by means, devices of any kind whatsoever, such as slot or coin machines, showing motion pictures. The word "view" in this article shall be construed to mean what is usually known as a stereopticon view or slide. The word "person" shall be construed to include an association, copartnership or a corporation. (An. Code, 1951, § 1; 1939, § 1; 1924, § 1; 1922, ch. 390, § 1; 1941, ch. 28.)

§ 2. Unlawful to show any but approved and licensed film.

It shall be unlawful to sell, lease, lend, exhibit or use any motion picture film or view in the State of Maryland unless the said film or view has been submitted by the exchange, owner or lessee of the film or view and duly approved and licensed by the Maryland State Board of Censors, hereinafter in this article called the Board. (An. Code, 1951, § 2; 1939, § 2; 1924, § 2; 1922, ch. 390, § 2.)

§ 3. Creation of Board of Censors.

The Board shall consist of three residents and citizens of the State of Maryland, well qualified by education and experience to act as censors under this article. One member of the Board shall be chairman, one member shall be vice-chairman and one member shall be secretary. They shall be appointed by the Governor, by and with the advice and consent of the Senate, for terms of three years. Those first appointed under this article shall be appointed for three years, two years and one year, respectively; the respective

terms to be designated by the Governor. (An. Code, 1951, § 3; 1939, § 3; 1922, ch. 390, § 3; 1939, ch. 430.)

§ 4. Vacancy in Board.

A vacancy in the membership of the Board shall be filled for the unexpired term by the Governor. A vacancy shall not impair the right and duty of the remaining members to perform all the functions of the Board. (An. Code, 1951, § 4; 1939, § 4; 1924, § 4; 1922, ch. 390, § 4.)

§ 5. Seal.

The Board shall procure and use an official seal, which shall contain the words "Maryland State Board of Censors," together with such design engraved thereon as the Board may prescribe. (An. Code, 1951, § 5; 1939, § 5; 1924, § 5; 1922, ch. 390, § 5.)

§ 6. Board to examine, approve or disapprove films; what films to be disapproved.

(a) *Board to examine, approve or disapprove films.* The Board shall examine or supervise the examination of all films or views to be exhibited or used in the State of Maryland and shall approve and license such films or views which are moral and proper, and shall disapprove such as are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes. All films exclusively portraying current events or pictorial news of the day, commonly called news reels, may be exhibited without examination and no license or fees shall be required therefor.

(b) *What films considered obscene.*—For the purposes of this article, a motion picture film or view shall be considered to be obscene if, when considered as a whole, its calculated purpose or dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever other merits the film may possess.

(c) *What films tend to debase or corrupt morals.* For the purposes of this article, a motion picture film or view shall be considered to be of such a character that its exhibition would tend to debase or corrupt morals if its dominant purpose or effect is erotic or pornographic; or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.

(d) *What films tend to incite to crime.* For the purposes of this article, a motion film or view shall be considered of such a character that its exhibition would tend to incite to crime if the theme or the manner of its presentation presents the commission of criminal acts or contempt for law as constituting profitable, desirable, acceptable, respectable or commonly accepted behavior, or if it advocates or teaches the use of, or the methods of use of, narcotics or habit forming drugs. (An. Code, 1951, § 6; 1939, § 6; 1924, § 6; 1922, ch. 390, § 6; 1955, ch. 201.)

§ 7. Certificate of approval or license.

Upon each film which has been approved by the Board, there shall be furnished by the Board, the following certificate or statement: "Approved by the Maryland State Board of Censors No. . . . ." and the Board shall also furnish a certificate or license in writing to the same effect, which certificate shall be the license for such film unless and until the same shall be revoked by said Board, and said certificate or license shall be exhibited by the holder thereof to any member of the Board or employee thereof upon demand. In the case of motion pictures, such statement shall be shown on the screen to the extent of approximately four (4) feet of film. Upon each film examined and approved by the Board, and upon each duplicate or print thereof, the Board shall stamp, by perforation or otherwise, the serial number and such other initials, words or designs as it may prescribe, the serial number to correspond to the number on the certificate of approval issued

by the Board to be shown upon the screen. In the case of slides or views, the Board shall furnish in writing a similar certificate or license and each set of views shall have at least two slides or views shown with a similar statement. Upon satisfactory proof being submitted to the Board that the certificate of approval attached to any film that has been examined and approved by the Board, has been lost, mutilated or destroyed, the Board shall have power in its discretion, and upon payment in advance of the fee prescribed by § 11 of this article, to issue a duplicate certificate of approval. Any certificate or license issued as herein provided may be revoked by the Board for any reason which would have justified the Board in refusing to issue such license, or for any violation of law by such applicant in securing such license, or in advertising or using the film or view so licensed. Thereafter any such film may again be submitted to the Board for approval and license. (An. Code, 1951, § 7; 1939, § 7; 1924, § 7; 1922, ch. 390, § 7; 1929, ch. 555, § 7.)

§ 8. Record of examinations.

The Board shall keep a record of all examinations made by it of films or views; noting on the record all films or views which have been approved, and those which have not been approved, with the reason for such disapproval. (An. Code, 1951, § 8; 1939, § 8; 1924, § 8; 1922, ch. 390, § 8.)

§ 9. Report to Governor.

The Board shall report, in writing, annually, to the Governor, on or before the first day of September of each year. The report shall show:

(1) A record of its meetings, and a summary of its proceedings during the year immediately preceding the date of the report.

(2) The results of all examinations of films or views.

(3) A detailed statement of all prosecutions for violations of this article.

(4) A detailed and itemized statement of all the incomes and expenditures made by or in behalf of the Board.

(5) Such other information as the Board may deem necessary or useful in explanation of the operations of the Board.

(6) Such other information as shall be requested by the Governor. (An. Code, 1951, § 9; 1939, § 9; 1924, § 9; 1922, ch. 390, § 9; 1945, ch. 66.)

§ 10. Oath and bond of officers of Board.

The chairman, vice-chairman and secretary shall, before assuming the duties of their respective offices, take and subscribe the oath prescribed by the Constitution of the State of Maryland, and each shall, upon entering the performance of his duties, be covered by a surety bond in accordance with the provisions of §§46 through 50 of Article 78A of the Annotated Code of Maryland. (An. Code, 1951, § 10; 1939, § 10; 1924, § 10; 1922, ch. 390, § 10; 1927, ch. 46; 1945, ch. 400; 1967, ch. 703.)

§ 11. Fees.

For the examination of each and every one thousand feet (1,000) of original motion picture film, or fractional part thereof, the Board shall receive in advance a fee of three dollars ($3.00), where the film averages sixteen (16) frames or less to the foot, and a fee of four dollars ($4.00) where the film averages more than sixteen (16) frames to the foot. For the examination of each original set of views, the Board shall receive in advance a fee of two dollars ($2.00) for each one hundred (100) views or fractional part thereof. The Board shall receive in advance a fee of one dollar ($1.00) for replacing any certificate or stamp of approval in accordance with the provisions of

§ 7 of this article; and the Board shall account for and pay all fees received by it into the State treasury. (An. Code, 1951, § 11; 1939, § 11; 1924, § 11; 1922, ch. 390, § 11; 1929, ch. 555, § 11; 1941, ch. 778; 1955, ch. 137; 1963, ch. 720; 1965, ch. 598.)

§ 12. Offices, expenses and compensation of Board.

The Board shall provide adequate offices and rooms in which properly to conduct the work and affairs of the Board in the City of Baltimore and the State of Maryland, and the expenses thereof, as well as any other expenses incurred by said Board in the necessary discharge of its duties, and also the salaries of the members of the Board; each of whom shall receive such compensation as shall be provided in the State budget, and each member of the Board shall be reimbursed for actual and necessary expenses incurred in furtherance of the Board's business within the State of Maryland, such as mileage, at the rate established by the Board of Public Works, hotel bills, the costs of meals and any other incidental expenses incurred in attending meetings or carrying out the other provisions of this article, such reimbursement not to exceed three thousand ($3,000.00) dollars per annum for any member of the Board. (An. Code, 1951, § 12; 1939, § 12; 1924, § 12; 1922, ch. 390, § 12; 1941, ch. 727; 1947, ch. 257; 1960, ch. 47; 1961, ch. 96.)

§ 13. Disposition of fines.

All fines imposed for the violation of this article shall be paid into the State treasury. (An. Code, 1951, § 13; 1939, § 13; 1924, § 13; 1922, ch. 390, § 13.)

§ 14. Right of entry.

Any member or employee of the Board may enter any place where films or views are exhibited; and such member or employee is hereby empowered and authorized to pre-

vent the display or exhibition of any film or view which has not been duly approved by the Board. (An. Code, 1951, § 14; 1939, § 14; 1924, § 14; 1922, ch. 390, § 14.)

§ 15. Obscene, indecent, etc., advertisements.

No person or corporation shall exhibit or offer to another for exhibition purposes any poster, banner or other similar advertising matter in connection with any motion picture film, which poster, banner or matter is obscene, indecent, immoral, inhuman, sacrilegious or of such character that its exhibition would tend to corrupt morals or incite to crime. If any such poster, banner or similar advertising matter is so exhibited or offered to another for exhibition it shall be sufficient ground for the revocation of the certificate or license for said film issued by the Board. (An. Code, 1951, § 15; 1939, § 15; 1924 § 15; 1922, ch. 390, § 15.)

§ 16. Enforcement; rules.

This article shall be enforced by the Board. In carrying out and enforcing the purpose of this article, it may adopt such reasonable rules as it may deem necessary. Such rules shall not be inconsistent with the laws of Maryland. (An. Code, 1951, § 16; 1939, § 16; 1924, § 16; 1922, ch. 390, § 16.)

§ 17. Film submitted for approval; false statements.

Every person intending to sell, lease, exhibit or use any film or view in the State of Maryland, shall furnish the Board, when the application for approval is made, a description of the film or view to be exhibited, sold or leased, and the purposes thereof; and shall submit the film or view to the Board for examination; and shall furnish a written statement or affidavit that the duplicate film or view is an exact copy of the original film or view as submitted for examination to the Board, and that all eliminations, changes

or rejections made or required by the Board in the original film or view have been or will be made in the duplicate. Any person who shall make any false statement in any such written statement or affidavit to the Board shall, upon conviction thereof summarily before a justice of the peace, be deemed guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, and any certificate or license issued upon a false or misleading affidavit or application shall be void ab initio; and any change or alteration in a film after license, except the elimination of a part or except upon written direction of the Board, shall be a violation of this article and shall also make immediately void the license therefor. (An. Code, 1951, § 17; 1939, § 17; 1924, § 17; 1922, ch. 390, § 17.)

§ 18. Interference with Board.

It shall be unlawful for any person to hinder or interfere in any manner with any member or employe of the Board while performing any duties in carrying out the intent or provisions of this article. (An. Code, 1951, § 18; 1939, § 18; 1924, § 18; 1922, ch. 390, § 18.)

§ 19. Review and approval or disapproval of film by Board; judicial determination; appeal; sale, exhibition, etc., of film without approval and license.

(a) Any film duly submitted to the Board for examination and licensing shall be reviewed and approved within five (5) days, unless the Board shall disapprove such film under the provisions of § 6 hereof, in which event the Board shall, within not later than three (3) days thereafter, apply to the Circuit Court for Baltimore City for a judicial determination as to whether such film is obscene, or tends to debase or corrupt morals, or incite to crime, within the meaning of § 6 hereof. Notice of such application shall be

forthwith sent by first-class mail, postage prepaid, to the address of the person presenting such film for licensing. The Circuit Court for Baltimore City shall, within five (5) days after the filing of said application, conduct a hearing, and shall in connection therewith view such film; within (2) days after such hearing said court shall enter its decree and order requiring that said film be approved and licensed or be disapproved if in violation of the provisions of said § 6 hereof. If the decree and order disapproves said film as being in violation of the provisions of § 6 hereof, then the person presenting such film for licensing may appeal such determination to the Court of Appeals of Maryland, in accordance with the Maryland Rules of Procedure, and said Court shall advance such case on its hearing calendar to the earliest practicable date; and, in reviewing the order appealed from, said Court shall view the subject film. The burden of proving that the film should not be approved and licensed shall rest on the Board.

(b) Any person who shall sell, lease, lend, exhibit or use any film in this State without having first secured approval thereof and a license therefor in accordance with the procedures set forth in subsection (a) above, shall be guilty of a misdemeanor and upon conviction summarily before a magistrate or the Municipal Court of Baltimore City, shall be sentenced to pay a fine of not less than fifty ($50.00) dollars, nor more than one hundred ($100.00) dollars, or to imprisonment for not more than thirty (30) days, or to be both fined and imprisoned in the discretion of the magistrate or judge. Except, no employee of any individual, partnership, firm, association, corporation, or other legal entity operating a theater which shows motion pictures, shall be subject to prosecution under this section if the employee is not an officer thereof and has no financial interest therein other than receiving salary and wages. (1969, ch. 223.)

§ 20. Penalties in general.

Any person who violates any of the provisions of this article for which a specific penalty is not provided and is convicted thereof summarily before any magistrate or justice of the peace, shall be sentenced to pay a fine of not less than twenty-five dollars, nor more than fifty dollars, for the first offense. For any subsequent offense the fine shal be not less than fifty dollars, nor more than one hundred dollars. In default of payment of a fine and costs, the defendant shall be sentenced to imprisonment in the prison of the county, or in Baltimore City, where such offense was committed, for not less than ten days, and not more than thirty days. All fines shall be paid by the magistrate or justice of the peace to the Board, and by it paid into the State treasury. (An. Code, 1951, § 20; 1939, § 20; 1924, § 20; 1922, ch. 390, § 20.)

§ 21. Particular penalties; appeal.

Any person who shall exhibit in public any misbranded film or film carrying official approval of the Board which approval was not put there by the action of the Board or any person who shall attach to or use in connection with any film or view which has not been approved and licensed by the Maryland State Board of Censors, any certificate or statement in the form provided by § 7 hereof or any similar certificate, statement or writing, or any person who shall exhibit any folder, poster, picture or other advertising matter, which folder, poster, picture or other advertising matter is obscene, indecent, sacrilegious, inhuman or immoral, or which tends to unduly excite or deceive the public, or containing any matter not therein contained when the approval was granted by the Board, shall be guilty of a misdemeanor, and upon conviction summarily before a justice of the peace, shall be fined not less than fifty dollars ($50) nor more than one hundred dollars ($100), or imprisonment for not over thirty days, or be

both fined and imprisoned in the discretion of the said justice of the peace. In addition to the above penalties, the Board may also seize and confiscate any misbranded film.

In all cases arising under this section there may be an appeal from the decision of the magistrate or justice of the peace where the fine imposed is in excess of fifty dollars ($50.00), or where the penalty imposed includes any term of imprisonment whatever. (An. Code, 1951, § 21; 1939, § 21; 1924, § 21; 1922, ch. 390, § 20A.)

§ 22. Failure to display approved seal.

If any person shall fail to display or exhibit on the screen the approval seal, as issued by the Board, of a film or view, which has been approved, and is convicted summarily before any magistrate, or justice of the peace, he shall be sentenced to pay a fine of not less than five dollars and not more than ten dollars; in default of payment of a fine and costs, the defendant shall be sentenced to imprisonment, in the prison of the county, or in Baltimore City, where such offense was committed, for not less than two days and not more than five days. (An. Code, 1951, § 22; 1939, § 22; 1924, §22; 1922, ch. 390, § 21.)

§ 23. Exemptions; permit.

This article shall not apply to any noncommercial exhibition of, or noncommercial use of films or views, for purely educational, charitable, fraternal or religious purposes, by any religious association, fraternal society, library, museum, public school, private school or institution of learning. The Board may, in its discretion, without examination thereof, issue a permit for any motion picture film, intended solely for educational, fraternal, charitable or religious purposes, or by any employer for the instruction or welfare of his employees, provided that the owner thereof either personally or by his duly authorized attorney or representative, shall file the prescribed application,

which shall include a sworn description of the film. No fee shall be charged for any such permit. (An. Code, 1951, § 23; 1939, § 23; 1924, § 23; §1922, ch. 390, § 22.)

§ 24. Severability.

The several sections and provisions of this article are hereby declared to be independent of each other; and it is the legislative intent that, if any of said sections or provisions are declared to be unconstitutional, such section or provision shall not affect any other portion of this article. (An. Code, 1951, § 24; 1939, § 24; 1934, § 24; 1922, ch. 30, § 23.)

§ 25. Money deposited for future rental of film—In general.

Whenever money shall be deposited or advanced on a contract for the future use or rental of motion picture films as security for the performance of the contract or to be applied to payments upon such contract when due, such money, with interest accruing thereon, if any, until repaid or so applied shall continue to be the money of the person making such deposit or advance and shall be considered a trust fund in possession of the person with whom such deposit or advance shall be made, and shall be deposited in a bank or trust company by the person receiving the same, and shall not be commingled with said person's other funds or become an asset of such person or trustee, and the person so paying the same shall be notified by the bank or trust company in which said funds are deposited. (An. Code, 1951, § 25; 1939, § 25; 1924, § 25; 1922, ch. 477.)

§ 26. Same—Waiver.

No waiver of the provisions of § 25 shall be made so as to evade the provisions of said § 25 and any such waiver if so made, shall be considered null and void. (An. Code, 1951, § 26; 1939, § 26; 1924, § 26; 1922, ch. 477.)

APPENDIX K

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 69-655-J

SERAFIM KARALEXIS ET AL., *Plaintiffs*,

v.

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, *Defendant*.

Before Aldrich, *Circuit Judge*,

Julian and Pettine, *District Judges*.

Opinion

November 28, 1969

ALDRICH, *Circuit Judge*. This is a three-judge district court action in which a frontal attack is made upon a state obscenity statute, based upon the Court's recent decision in *Stanley* v. *Georgia*, 1969, 394 U.S. 557. In that case the Court reversed a state conviction for possession of a concededly obscene moving picture film, found in the home of the defendant. We are asked to rule that this decision extends to a case where the possessors permitted a number of consenting adults or, more exactly, paying adult members of the public, to view their possibly obscene picture in a moving picture house.

Briefly, the facts are these. Plaintiffs Karalexis et al. are the owners and operators of a moving picture theatre which has been engaged in showing a film, owned and leased by Grove Press, Inc.,[1] entitled "I Am Curious

[1] Grove Press, Inc.'s motion to intervene was originally denied, counsel being permitted, instead, to appear as an amicus. In view of this opinion, Grove Press may be allowed to renew its motion at an early date.

(Yellow)." The named defendant is the county district attorney who has charged plaintiffs with violation of Mass. G.L. c 272 § 28A[*] as a result of their exhibiting the film, but notice has been given 28 U.S.C. § 2284, and an assistant attorney general has conducted the defense throughout. Plaintiffs seek a declaration that the statute is unconstitutional and an injunction against prosecution thereunder. Because of the fact that the original indictments were defective, the proceedings sought to be enjoined postdate the assumption of jurisdiction by this court, and no question arises under 28 U.S.C. § 2283, the anti-injunction, or what is sometimes called the comity, statute.

Defendant's broad motion to dismiss tests the substance of plaintiffs' case. Our present question, however, is only whether we shall issue a temporary injunction pending final disposition, there being possible reasons to withhold the making of a final decision, which we have not yet fully explored. Alternatively, there is the question whether we should abstain altogether, without granting temporary relief. With respect to the first question the issues, of course, are whether there is a probability that plaintiffs will ultimately prevail, *Automatic Radio Mfg. Co.* v. *Ford Motor Co.*, 1 Cir., 1968, 390 F. 2d 113, *cert. denied* 391 U.S. 914, and the adequacy of the remedy at law.

The following facts appear by stipulation of counsel or otherwise. Plaintiffs have sufficiently indicated to the viewing public the possible offensiveness of the film, so

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[*] "§ 28A. Importing, printing, distributing or possessing obscene things

Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibition, loan or circulation, shall be punished . . ."

that no patron will be taken unawares and his sensibilities offended. On the other hand, the film is not advertised in any pandering manner within the structure of *Ginsburg* v. *United States*, 1966, 383, U.S. 463. Finally, it is conceded that the theatre is policed, so that no minors are permitted to enter.

For purposes of this case we assume that the film is obscene by standards currently applied by the Massachusetts courts.[3] In this connection we note that the Superior Court of Massachusetts, in the recent case of *Commonwealth* v. *Karalexis*, has found that "the dominant theme of the film . . . is its appeal to prurient interest in sex . . . . [The film] is patently offensive to the average person and an affront to community standards. . . . [It] is utterly without redeeming social value." Except insofar as it found statements in the opinion favorable to its conclusions in other respects, the Superior Court disposed of *Stanley* v. *Georgia* by stating it to be "irrelevant."

In *Stanley* Mr. Justice Marshall wrote the opinion of the Court in which four others joined. Mr. Justice Black concurred in the result because, in his mind, no case-by-case reasoning is needed in the area of obscenity; all is permissible.[4] The remaining three justices concurred on

[3] Another court, viewing this same film, has differed. *United States* v. "*I Am Curious (Yellow)*," 2 Cir., 1968, 404 F.2d 196.

[4] The Superior Court's extensive analysis in *Karalexis* of a decade of the Supreme Court's views, reaching the conclusion that there is no majority agreement on any one approach to obscenity apart from the fact that it disregards such an agreement in *Stanley*, overlooks the fact that if only four, or even three, justices agree on one method by which immunity is reached, this agreement is as significant as if five joined, so long as there are enough other justices who can be counted on to concur in the result. If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot.

the Fourth Amendment grounds,[5] stating that the obscenity question should not have been reached. The Court held that in certain circumstances possession of a moving picture film is constitutionally protected even though by contemporary standards the film is obscene. We do not consider this irrelevant.

The question is, how far does *Stanley go?* Is the decision to be limited to the precise problem of "mere private possession of obscene material," 394 U.S. at 561; is it the high water mark of a past flood, or is it the precursor of a new one? Defendant points to the fact that the Court in *Stanley* stated that *Roth* v. *United States*, 1957, 354 U.S. 476, was "not impaired by today's holding," and in the course of its opinion recognized the state's interest there upheld in prohibiting public distribution of obscenity. Yet, with due respect, *Roth* cannot remain intact, for the Court there had announced that "obscenity is not within the area of constitutionally protected speech or press," 354 U.S. at 485,[6] whereas it held that Stanley's interest was protected by the First Amendment, and that the fact that the film was "devoid of any ideological content" was irrelevant. 394 U.S. at 566.

Of greater importance, a need for affirmative proof that obscenity raises a "clear and present danger of anti-social conduct or will probably induce its recipients to such con-

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[5] Not the Fourth Amendment grounds on which the defendants assert the majority opinion rests. The three concurring justices regarded the warrant under which Stanley's home had been searched insufficient to justify the seizure of the film. The opinion of the Court, pointedly, it may be thought, ignored that issue. The present defendant's claim that, nevertheless, the Court looked to a Fourth Amendment general protection of privacy, is made in the face of the fact that the Court spoke constantly in terms of the First and Fourteenth Amendments and did not mention the Fourth.

[6] "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484.

duct," rejected in *Roth*, was stated in *Stanley* to have been rejected in the area of "public distribution." The obverse is apparent. Of necessity the *Stanley* court held that obscenity presented no clear and present danger to the adult viewer, or the the public as a result of his exposure. Obscenity may be offensive; it is not per se harmful.[7] 394 U.S. at 567. Had the Court considered obscenity harmful, as such, the fact that the defendant possessed it privately in his home would have been of no consequence.

In recognizing that public distribution differed from private consumption, the Court in *Stanley* gave two examples. In the case of public distribution, "obscene material might fall into the hands of children. . . . or . . . it might intrude upon the sensibilities or privacy of the general public." 394 U.S. at 567. To these examples, which were the extent of the Court's discussion, it can be said, equally with *Stanley*, "No such dangers are present in this case."

We confess that no oracle speaks to Karalexis unambiguously. Nonetheless, we think it probable that *Roth* remains intact only with respect to public distribution in the full sense, and that restricted distribution, adequately controlled, is no longer to be condemned. It is difficult to think that if Stanley has a constitutional right to view obscene films, the Court would intend its exercise to be only at the expense of a criminal act on behalf of the only logical source, the professional supplier.[8] A constitutional right to receive a communication would seem meaningless if there were no coextensive right to make it. *Cf. Griswold v. Connecticut*, 1965, 381 U.S. 479. If a rich Stanley can

[7] Non constat that a film which went beyond ordinary obscenity by exhorting sexual misconduct might be prohibited. Exhortation is not suggested in the case at bar.

[8] It may be suggested that the supplier would run a particular risk, since the apprehended possessor of the film would, under *Stanley*, have no Fifth Amendment privilege to resist inquiry.

view a film, or read a book, in his home, a poorer Stanley should be free to visit a protected theatre or library. We see no reason for saying he must go alone.[9]

So much for the probability of success. We do not agree with defendant's contention that there is no indication of irreparable injury. Even if money damages could be thought in some cases adequate compensation for delay, this defendant will presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset.[10] It has been said, also, that in assessing injury the chilling effect upon the freedom of expression of others is to be considered. *See Dombrowski* v. *Pfister*, 1965, 380 U.S. 479, 486-89.

This leads us to defendant's contention that we should, nevertheless, abstain until the Massachusetts Supreme Judicial Court has considered this question, since plaintiffs can raise it in their appeal from their Superior Court convictions. However, if our interpretation of *Stanley* is correct, we find it difficult to think the Massachusetts statute susceptible to a construction which would save it from overbroadness. Hence we must regard abstention as improper. *Zwickler* v. *Koota*, 1967, 389 U.S. 241. In the field where Congress has established a three-judge district court, abstention may still be warranted if there is a reasonable likelihood that the state court may construe its statute so as to avoid constitutional issues, but abstention is not appropriate simply to allow the state court to be

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[9] For a further discussion of *Stanley* v. *Georgia*, *see* The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 147-154 (1969).

[10] The fact that plaintiffs are economically motivated is of no significance. *New York Times* v. *Sullivan*, 1964, 376 U.S. 254. In *Interstate Circuit, Inc.* v. *Dallas*, 1968, 390 U.S. 676 at 684, the Court spoke disapprovingly of the effect of the Dallas ordinance upon "one who wishes to convey his ideas through that medium [films], which of course includes one who is "interested not so much in expression as in making money. . . ."

the one to decide the statute's basic conflict with the federal constitution.[11]

We do not understand, however, certain apprehensions voiced by the defendant. We note, accordingly, that this is a decision of probability, not a final holding that the Massachusetts statute is unconstitutional. Much less is it a decision that one who distributes to children, or who creates a clear public nuisance, has standing to raise the contention that the statute is overbroad.[12] The preliminary injunction presently to issue will be restricted to, and conditioned upon, plaintiffs' adherence to the restrictions described earlier in this opinion. Nor do we consider the difference between the right to regulate conduct as distinguished from expression. *Cf. Derrington* v. *City of Portland, Or.* 2/26/69, *cert. denied* 38 L.W. 3170. Finally, we voice no opinion as to the legal consequences if plaintiffs exhibit their film under the protection of our injunction, and it is ultimately determined that our view was mistaken and that such exhibition was properly considered illicit.

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[11] There is an alternative possibility, that the Supreme Judicial Court would find the film not obscene. The Superior Court, in an elaborate opinion, has found otherwise. We are not moved by the thought that we should postpone permitting plaintiffs to exhibit their film on the ground that, after all, it is *not* obscene.

[12] Normally standing is granted only when a defendant's own conduct is constitutionally protected. *United States* v. *Raines*, 1960, 362 U.S. 17. This rule has been relaxed in cases dealing with statutes affecting free expression. *See United States* v. *Raines, supra*, at 22 (dictum); *Thornhill* v. *Alabama*, 1940, 310 U.S. 88, 96-98; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962). However, even where free speech is involved, it may be that standing should not be granted unless the defendant's conduct is at least *arguably* constitutionally privileged. *Cf. Brown* v. *Louisiana*, 1966, 383 U.S. 131, 143, 147-48 (concurring opinion of Mr. Justice Brennan); *Dennis* v. *United States*, 341 U.S. 494, 515-17. We do not reach such questions.

Because of the importance of the matter, the injunction will not issue for one week, to permit plaintiffs to add other parties, if so advised, and to give the defendant the opportunity to apply to the Circuit Justice for a stay.

BAILEY ALDRICH
U. S. Circuit Judge

RAYMOND J.
U. S. District Judge

Dissenting Opinion

November 28, 1969

JULIAN, J. (dissenting)

I do not agree with the majority. The constitutionality of the Massachusetts criminal obscenity statute[1] is presently being litigated in the Massachusetts Courts. Pending final adjudication by the Supreme Judicial Court of the plaintiffs' appeal from their conviction in the Superior Court for violating that statute, this Court should abstain from taking further action in this case and should not interfere with the enforcement of the statute by the Commonwealth by enjoining its public officials from prosecuting the plaintiffs for additional violations of the statute should they persist in exhibiting the film while their conviction still stands.

It is my understanding that for the purpose of deciding the questions presently before us the Court assumes that

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[1] Mass. G.L. c. 272, § 28A provides as follows:

"Whoever . . . has in his possession . . . any obscene . . . print, picture, figure, image . . . for the purpose of . . . exhibition . . . shall be punished . . ."

The Massachusetts Court has construed this statute implicitly to require proof that the defendant *knowingly* has such material in his possession. *Demetropoulos* v. *Commonwealth*, 1961, 342 Mass. 658.

the film involved in this litigation is in fact obscene within the meaning of the law. In fact, no evidence has been taken and no finding made on this issue by this Court. The Superior Court has found the film to be obscene.

The plaintiffs' reliance on *Stanley* v. *Georgia*, 394 U.S. 557 (1969), is untenable. The case before us is governed by *Roth* v. *United States*, 354 U.S. 476 (1957). The precise issue in *Roth* was the constitutionality under the First Amendment of two criminal obscenity statutes. One was a Federal statute (18 U.S.C. § 1461) which made it a crime for anyone to deposit for mailing and delivery obscene books, circulars, or advertising. The other was a California statute (West's Ca. Penal Code Ann., 1955, § 311) which made it a crime for any person willfully and lewdly to keep for sale an obscene book or to publish an obscene advertisement of them. The Supreme Court held both statutes constitutional.

The Massachusetts statute before us is essentially the same as the two statutes upheld in *Roth* in that all three make the public distribution of obscene matter a criminal offense. This being so, it must follow as a matter of elementary logic that the Massachusetts statute is also constitutional.

The holding in *Roth* is still the law and is binding upon this Court. It has not been overruled by *Stanley* or any other case.

In *Stanley* the appellant was indicted, tried and convicted for "knowingly hav[ing] possession of . . . obscene matter" in violation of a Georgia statute. The Georgia Supreme Court affirmed, holding it "not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with 'intent to sell, expose or circulate the same.' ". Appellant contended that the Georgia obscenity statute was unconstitutional insofar as it punishes mere private possession of obscene matter. The United States Supreme Court agreed and

held that "the mere private possession of obscene matter cannot constitutionally be made a crime." The Supreme Court takes pains to distinguish the case before it from *Roth* and similar cases in which *public commercial dissemination* of obscene material is involved.

The Court notes (p. 559) that the Georgia statute extended "further than the typical statute forbidding commercial sales of obscene material." It also notes (p. 559) that the "State and appellant both agree that the question here before us is 'whether a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter' is constitutional." The Court points out (pp. 560-561) that neither *Roth* nor any subsequent decision dealt with that question but "dealt with the power of the State and Federal Governments to prohibit or regulate certain *public* actions taken or intended to be taken with respect to obscene matter." (Emphasis supplied.)

And again at p. 567: "But that case [*Roth*] dealt with public distribution of obscene materials and such distribution is subject to different objections." In note 10 on the same page the Court makes reference to the Model Penal Code § 251.4 (American Law Institute, Proposed Official Draft, 1962) which would also make commercial dissemination of obscene matter a criminal offense. The Court concludes by stating (p. 568):

> "We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home."

Thus the Supreme Court itself has declared in clear, unambiguous language that the holding in *Roth* has not been overruled by the decision in *Stanley* and is still the law.

Accordingly, on the authority of *Roth*, I would reject as wholly unjustified the plaintiffs' contention that the Massachusetts obscenity statute is unconstitutional on its face.

On the question of abstention, the pertinent cases are *Dombrowski v. Pfister*, 1965, 380 U.S. 479,[2] and *Zwickler v. Koota*, 1967, 389 U.S. 241.[3] In both those cases the statutes under attack were held to be overbroad and susceptible of sweeping and improper application and therefore justifiably attacked on their face as abridging expression protected by the First Amendment. Additionally, though threatened with prosecution, the petitioner in neither case was then in fact being prosecuted for violating the challenged statute and consequently its constitutionality was not being litigated in the State court. In *Dombrowski* there was the added element of bad faith on the part of the State prosecutor, an element certainly not present here. The Court accordingly, held that abstention was not appropriate. Since the Massachusetts statute is not being justifiably attacked on its face as abridging free expression and since the case in the Massachusetts Court has been tried and decided and is now on appeal, it seems to me especially appropriate for this Court to abstain from proceeding to a declaratory adjudication of the constitutionality of the statute until the Supreme Judicial Court shall have heard and decided the appeal. The parties anticipate that this will happen within the next three or four months.

No injunction should issue against the defendant district attorney. He should be left free to prosecute these plaintiffs should they resume the exhibition of the film while their conviction in the Superior Court remains outstanding and their appeals pending.

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[2] The statute under attack was the Louisiana Subversive Activities and Communist Propaganda Control Law.

[3] The statute prohibited the distribution of anonymous handbills critical of political candidates.

The plaintiffs have failed to show the existence of the requisite grounds that would justify the issuance of a preliminary injunction:

(1) Since the statute is not unconstitutional on its face and the film is assumed by the Court to be obscene,[4] and has been found to be obscene by the Superior Court, the plaintiffs have failed to establish the probability that they will ultimately prevail in this litigation.

(2) There is no evidence before us that plaintiffs will suffer irreparable injury if they are prevented from showing the film until final disposition of their appeal. There has been no showing of the extent of the monetary loss, if any, that they will suffer if they are not allowed to show the film. We should not concern ourselves with the diminution in value of the film if its showing is delayed for a substantial period of time. The film is not owned by the plaintiffs, but by Grove Press, Inc.,[5] which is not a party to this litigation. Furthermore, there is no evidence of the economic value of the film.

(3) The mere possibility that plaintiffs may be deprived of a constitutional right pending final determination of this case does not amount to the irreparable injury necessary to justify the issuance of the injunction.

Thus, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-485, the Court states:

> "[T]he Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that

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[4] In its Memorandum of July 15, 1969, this Court said: "[T]he Court . . . will not consider now or at any other time the claim that the film is not obscene, as an evidentiary matter."

[5] The motion of Grove Press, Inc., to intervene as a party plaintiff was denied by the Court on July 15, 1969.

state courts and prosecutors will observe constitution limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

What the majority of this Court is doing to day is without precedent. It is declaring that the public, commercialized dissemination of obscene matter to adults, regardless of how lewd and degenerate it may be, is protected expression under the First Amendment. I have found no authority for this proposition either in decided cases or in legislative enactments. On the contrary numerous statutes, both Federal and State, and a multitude of cases decided by the Supreme Court of the United States[6] and by other courts, Federal and State, have consistently denounced and punished as criminal the public, commercialized dissemination of obscene matter.

In my opinion the position taken by the majority of this Court is legally unsound and inimical to the public interest. I must therefore dissent.

/s/ ANTHONY JULIAN
United States District Judge

[6] See, for example the cases listed in *Stanley*, supra, notes 5 and 6, at page 561.